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No. 1216

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

ARTHUR C. ALLYN, JR.

Petitioner,

v.

ROBERT J. FLANNERY AND WILLIAM MOORE

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

Petitioner, Arthur C. Allyn, Jr., prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, First District, affirming libel judgments based on jury verdicts of $10,000 for each respondent-police officer entered by the Circuit Court of Cook County, Illinois, First Municipal District.

OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, reproduced in the Appendix, is officially reported at 75 Ill. App. 2d 365 and unofficially reported at 221 N.E. 2d 89.

JURISDICTION

The judgment of the Appellate Court of Illinois was dated and entered on October 6, 1966. On November 30, 1966, a timely petition for leave to appeal was filed in the Supreme Court of Illinois. On January 18, 1967, the Supreme Court of Illinois denied the petition for leave to appeal, making the Appellate Court's judgment that of the highest court of the State of Illinois in which a decision could be had.

This Court has jurisdiction to review the judgment of the Appellate Court by writ of certiorari because a Federal constitutional right is claimed by petitioner. (28 U.S.C. § 1254(3).)

QUESTIONS PRESENTED

I

Whether a citizen's letter to the Chief of Police, mistakenly—but in good faith—implying that two police officers had solicited a bribe, is constitutionally privileged under the doctrine of *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964) and *Garrison* v. *Louisiana,* 379 U.S. 64 (1964).

II

Whether the Appellate Court's determination that petitioner's right to object to erroneous jury instructions on the basis of *Times* and *Garrison* was waived because not properly raised in the trial court is an adequate State procedural ground serving a legitimate State interest which bars review by this Court even though (a) *there was no intentional waiver* because counsel was not aware that *Times* had been decided three months before trial, (b) the jury instructions were in accordance with prevailing Illinois law in qualified privilege cases, defining actual malice

as ill will, and (c) it was not until *Garrison* was decided, *five months after trial,* that ill will was eliminated as a constitutionally appropriate definition of actual malice.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States:

Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE HEART OF THE MATTER

Acting under the mistaken—but honest—belief that two policemen (later identified as respondents) had solicited a bribe from his daughter when a car in which she was riding was stopped for speeding, petitioner wrote an accusing letter to the Chief of Police which triggered an investigation that embarrassed respondents even though their innocence was established.

Under Illinois libel law, petitioner's letter was qualifiedly privileged (absent a showing of actual malice), since it was *from* a citizen having a moral duty to report apparent police irregularities *to* a commanding officer having a duty to investigate such reports. But Illinois, like other states with a qualified privilege rule, defined actual malice as ill will or intent to injure and allowed this to be inferred from such circumstantial evidence as the language of the defamatory statement itself or the writer's negligent failure to ascertain the truth. The jury was instructed accordingly and awarded each respondent $10,000 damages.

The trial was held three months after this Court's decision in the *New York Times* case established that the Federal Constitution protects defamatory criticism of public officials unless made with actual malice, but five months before this Court's decision in the *Garrison* case established that neither ill will nor negligent failure to ascertain the truth was sufficient to meet the constitutional definition of actual malice and that only knowledge or reckless disregard of falsity would suffice.

Being unaware of the *Times* decision, petitioner's trial counsel did not raise a constitutional objection to the jury instructions, though he did bring the *Times* case to the Trial Judge's attention at the hearing on his post-trial mo-

tion for judgment notwithstanding the verdict, which was denied without opinion.

The Illinois Appellate Court refused to consider petitioner's claim that the ill will and negligence instructions were constitutionally defective under *Times* and *Garrison*, holding that the constitutional issue had been waived by counsel's failure to object at trial.

Certiorari should be granted because this case presents important Federal questions—both substantive and procedural—not previously decided by this Court.

On the merits, there is an opportunity to clarify the meaning of the "public official" designation by holding that it has a relative, not an absolute, meaning, depending on the function to be served by granting constitutional protection to the criticism involved. This case presents an ideal factual setting for the development of this concept because it juxtaposes the most innocuous type of defamatory criticism (a private letter to a superior officer) and a lower rank of government employee (policemen on the beat).

Procedurally, there is an opportunity to clarify the impact of the new constitutional protection on cases which were pending while the *Times* and *Garrison* concepts were being developed.[1] Where there has been no intentional waiver of a known constitutional right, the appellate courts should not be allowed to nullify the effect of *Times* and *Garrison* by declaring procedural forfeitures which are not

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[1] The *Butts* case, argued before this Court but not yet decided, involves the waiver question where the trial was held before *Times* was decided but defense counsel were aware of the constitutional argument being advanced in *Times*; whereas, in this case, the trial was held shortly after *Times*, but before *Garrison*, and trial counsel was not aware of *Times* and its implications.

required under State law and which serve no legitimate State interest.

This is such a case, for there is no waiver under Illinois law where a complaint is wholly defective to state a cause of action or where a trial defect is revealed by a post-trial change in the applicable law, and either *Times* rendered respondents' complaint fatally defective for failure to allege knowledge or reckless disregard of falsity or *Garrison* was a post-trial change in the law which revealed the fundamental defects in the trial court's ill will and negligence instructions.

Even if there had been a technical waiver under Illinois law, this Court may nevertheless consider the merits because the Appellate Court itself had discretion to ignore the waiver under the Illinois rule that errors so substantial as to amount to the denial of a fair trial may be raised for the first time on appeal.

Finally, even if there was a waiver which the Appellate Court had no discretion to ignore, the application of the waiver doctrine in this particular case serves no legitimate State interest to preclude this Court from considering the constitutional question. Since recognition of petitioner's constitutional privilege—either by the Trial Judge on the post-trial motion or by the Appellate Court—would have required dismissal of the suit without a new trial, orderly judicial procedure is not prejudiced by allowing the constitutional question to be raised after the trial, in view of counsel's understandable ignorance of *Times* at the time of trial.

STATEMENT

In July of 1958, petitioner, in helping his 19-year-old daughter, Dorothy, balance her bank statement, came across a check for $15 made out to "Cash" and bearing no endorsement except the stamped name of a bar on North Clark Street in Chicago. (R. 28, 35, 65.)[2]

When petitioner asked Dorothy what she was doing in the tavern, she explained that this was a check she had given to a policeman in payment of a "fine" when she and two friends were stopped for speeding on the Outer Drive. Pressed for details, Dorothy told her father that the fine was actually $25, but the driver of the car, Paul Power, had only $10, so Dorothy had written a check for $15 to make up the difference and made it payable to "Cash" at the policeman's request. (R. 28-29, 35-36, 45-46.)

Knowing that traffic fines are not collected on the street and feeling that the circumstances under which the check was given and the fact that it was cashed without personal endorsement were highly suspicious, petitioner called the third occupant of the car, Sue Owens, to find out what she knew about the incident and Sue confirmed Dorothy's story. (R. 29, 40-42, 46, 48.)

Petitioner also tried to contact Paul Power, the driver, but found that he was spending the summer at a ranch in a remote area in the Canadian Northwest and could not be reached by telephone or telegraph. (R. 29, 46.)

Believing that the police had solicited a bribe and that it was his duty to inform the proper authorities promptly, petitioner wrote the following letter (R. 30-31, 33, 46-49, 61):

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[2] Record references are to the Abstract of Record, printed for the use of the court below. Nine copies of the printed Abstract and Supplemental Abstract have been filed in this Court pursuant to paragraph 4 of Rule 21.

July 21, 1958

Chief George Otlewis
Police Division
Chicago Park District
Administrative Building
425 East 14th Blvd.
Chicago 5, Illinois

Prior to noon on March 23rd, on the outer drive, the officers driving police car # 920, license # M7716,[3] solicited a check from my daughter, a copy of which is enclosed, when the car in which she was riding was stopped for "speeding". When she asked the officers to whom the check should be made, they said, "cash what else". The check was pre-dated March 22nd because the 23rd was a Sunday. Further, this solicitation was done in front of witnesses.

I regret having to advise you of this situation at such a late date, but you will note that the check was not put through the bank until the 31st, and since my daughter is away at school, and we just recently returned from a trip to Hawaii, there was no opportunity to present this matter until now. I expect disciplinary action to be taken promptly.

The newspapers have not been advised, and I have no intentions at the present time of doing so.

A. C. Allyn, Jr. (signed)

Chief Otlewis initiated an investigation which soon revealed that, instead of taking a bribe, the policemen (respondents here) had actually done a favor for the three young people by personally cashing Dorothy's check so the

[3] Petitioner did not know the names of the policemen; however, he obtained the police car number and license number from his daughter, who had jotted it down on the blotter in her checkbook when she wrote the check. (R. 40, 41, 47.)

driver could post a cash bond and not have to spend the night in jail. (R. 14-15, 17-18, 21, 23, 67.)

Respondents sued petitioner for libel. At the first trial, the Judge ruled that petitioner's letter was libelous *per se* and submitted the case to the jury on the question of damages only. However, the jury's award of $1,400 actual damages and $100 exemplary damages to each respondent was reversed by the Appellate Court of Illinois, on the first appeal, on the theory that, since petitioner was merely performing "his moral duty to report apparent irregularities in the conduct of the local law enforcement officers" and since "The communication was directed to the proper party" (the police chief), whose responsibility it is to investigate such matters, the letter was "qualifiedly privileged" and there could be no liability without a showing of "actual malice," an issue which should have been submitted to the jury. *Flannery* v. *Allyn,* 47 Ill. App. 2d 308, 309, 318-319 (1st Dist. 1964).

At the second trial, on June 16 through 19, 1964, the Judge instructed the jury that actual malice "means ill will towards a particular person, an actual intention to injure or defame him" and that actual malice could be established by such circumstantial evidence as "failure to make a proper investigation, ill will, mode and extent of publication and falsity." (R. 58-59, 62.) These were proper instructions under the Illinois law concerning qualifiedly privileged communications. (App. Ct. Op., App. 38-39.) Indeed, petitioner's trial counsel, John T. Garrity, had requested the ill will instruction and, while he did object to the circumstantial evidence and negligence instructions, he did not do so on constitutional grounds. (R. 49.) He was not aware that, in *New York Times Co.* v. *Sullivan,* 376 U.S. 254, decided on March 9, 1964, three months before the trial, this

Court had given constitutional protection to defamatory criticism of public officials. (App. 36, 48.)

The jury awarded $10,000 damages to each respondent. (R. 7-9.)

On July 15, 1964, petitioner filed a post-trial motion for judgment notwithstanding the verdict or for a new trial, complaining of a violation of his constitutional rights and renewing his objections to the circumstantial evidence and negligence instructions. (R. 9-12, ¶¶ 3, 9, 10.)

On October 14, 1964, as shown by an affidavit of counsel which the Appellate Court refused to allow to be filed (reproduced in the Appendix), the Trial Judge heard oral argument in chambers on petitioner's post-trial motion, at which time petitioner's trial counsel called the Judge's attention to the *Times* case and, at the close of the argument, the Judge asked for and received a copy of the *Times* case. (Certified Record, p. 506; App. 48.)

On October 19, 1964, the Trial Judge overruled petitioner's post-trial motion, without stating reasons. (R. 12.)

On appeal, petitioner argued that both the ill will and negligence instructions were erroneous under the *Times* rule, as clarified and significantly enlarged by *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), which was decided five months *after* the trial in the case at bar. But the Appellate Court refused to consider the impact of *Times* and *Garrison*, holding that petitioner had waived his right to object to the instructions on constitutional grounds because of his trial counsel's failure to raise the constitutional question in the trial court. (App. Ct. Op., App. 41-43.)

REASONS FOR GRANTING THE WRIT

I

WHETHER PETITIONER'S LETTER WAS CONSTITUTIONALLY PRIVILEGED IS A SUBSTANTIAL FEDERAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT

The Guidelines Announced by the Court Have Not Resolved Whether Policemen Are "Public Officials" Under the *Times* Rule

In *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), this Court held that the Constitution delimits a State's power to award damages for libel in actions brought by *public officials* against critics of their *official conduct*. But the Court specifically left open for future consideration the precise extent of the "public officials" category and the "official conduct" concept (376 U.S. 254, 283, n. 23):

> We have no occasion here to determine how far down into the lower ranks of government employees the "public official" designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. Cf. *Barr* v. *Matteo*, 360 U.S. 564, 573-575. Nor need we here determine the boundaries of the "official conduct" concept.

Similarly, in *Rosenblatt* v. *Baer*, 383 U.S. 75, 85-87 (1966), the Court declined to announce a precise definition of a "public official," commenting that the designation surely

> • • • applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs, • • •

but that it might not apply to a lesser Government employee unless his position is

> * * * one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.

Whether these respondents are "public officials" under these guidelines—or, indeed, whether these guidelines are to be taken as definitive—is a novel question. On the one hand, it could be argued that respondents were merely ordinary policemen and, therefore, similar to the night watchman accused of stealing state secrets who was posited in *Rosenblatt* as an example of a Government employee who would not be considered a "public official" because his position was not one which would invite public scrutiny apart from the particular charges in controversy. 383 U.S. at 87, n. 13.

On the other hand, it could be argued that, precisely because respondents *are* ordinary policemen, exercising the most basic of all governmental powers in direct and constant contact with the public, criticism of their official integrity is necessarily protected by the *Times* rule. By its very nature, abuse of power by the police is difficult to discover and correct. All too often, the citizen-victim is either afraid or unwilling to speak out. Thus, the *only* effective deterrent to police corruption is an alert and articulate citizenry, uninhibited from reporting apparent police misconduct by the threat of libel suits.

Curiously enough, the policy which favors unbridled criticism of the official conduct of those who exercise the police power was given a most eloquent exposition by the same appellate court which refused to enforce the policy in this case. On the first appeal, the Court said (*Flannery* v. *Allyn*, 47 Ill. App. 2d 308, 319 (1st Dist. 1964)):

> The defendant had an interest, as does every citizen, in the maintenance of an efficient Police Department, free from corruption. The defendant did not know the facts at the time he wrote the letter, but believed that the plaintiffs had solicited a bribe and were derelict in their duty, and under these circumstances it could be said that it was his moral duty to report apparent irregularities in the conduct of the local law enforcement officers. The communication was directed to the proper party, one having a duty or interest corresponding to that of the defendant. It is the responsibility of the Police Chief to investigate instances of apparent misconduct by his subordinates and to take appropriate disciplinary action where necessary.

No Court Has Considered the Scope of the *Times* Privilege in the Context of a Private Communication to a Government Employee's Superior Officer

Whether this policy is strong enough to bring the policeman on the beat within the ambit of *Times* is itself enough to warrant consideration by the Court. But, in addition, this case presents the "public official" question in the unique context of a *private* communication to a superior officer complaining of apparent police corruption, rather than a widely disseminated *public* criticism, such as the newspaper advertisement involved in *Times* itself or the kinds of publications involved in the few cases decided by lower courts since *Times* which have held that policemen *are* public officials within the meaning of *Times*. For example, *Pape* v. *Time, Inc.*, 354 F. 2d 558 (7th Cir. 1965), certiorari denied, 384 U.S. 909 (1966), involved a statement in Time magazine that a Chicago police lieutenant was guilty of police brutality; *Gilligan* v. *King*, 264 Misc. 2d 212

(N.Y. S.Ct. 1965), involved posters accusing a New York police lieutenant, who shot a Negro boy in self-defense, of murder; and *Arscott* v. *Washington Post* (D.C.D.C. Civil No. 1025-61, decided May 20, 1964, but unreported), involved a newspaper editorial accusing three plainclothes policemen of homosexuality.

The factual context in which the "public official" question is presented is all-important, for the term should not be given an absolute definition. Rather, as the Court suggested in *Rosenblatt* v. *Baer*, 383 U.S. 75, 85, n. 10 (1966), "the scope of the privilege is to be determined by reference to the functions it serves." For example, scathing *newspaper* criticism of an ordinary policeman or a watchman in a government building may call for a different definition of the term "public official" than a simple *letter* of complaint to his superior; and yet none of the cases decided since *Times* has afforded an opportunity for this kind of analysis.

The Court Has Not Ruled on the Impact of *Times* on the Law of States Which Already Had a Qualified Privilege for Private Communications to a Superior Officer

Finally, this case squarely presents the question of the impact of *Times* on the law of those States, such as Illinois, which already had a qualified-privilege rule requiring proof of "actual malice" for private defamatory communications criticizing the way in which a governmental employee has performed his duties. Are such communications now privileged by the Federal Constitution as well as under State law and, if so, has the *Garrison* v. *Louisiana*, 379 U.S. 64, 78-79 (1964), definition of actual malice to mean knowledge

or reckless disregard of falsity displaced the former ill will-intent to injure standard?

To summarize: At issue here is the nature and scope of the constitutional protection to be accorded a citizen who in good faith dares to criticize the integrity of governmental employees in the performance of their duties—not in a dramatic-civil-rights or burning-public-issue context, but in the context of a common citizen's concern about an apparent abuse of police power. This Court has not yet come to grips with this problem.

II

THE PROCEDURAL FORFEITURE INVOKED BY THE APPELLATE COURT DOES NOT PRECLUDE REVIEW OF THE CONSTITUTIONAL ISSUE BY THIS COURT

In *Henry* v. *Mississippi*, 379 U.S. 443, 446-447 (1965), this Court said that despite the familiar principle that this Court will decline to review State court judgments which rest on independent and adequate state grounds, where a State court judgment rests on a purely *procedural* ground,

> * * * we have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question.

For the purpose of determining whether a State procedural rule which prohibits the raising of Federal questions at late stages in a case precludes review of substantial Federal questions by this Court, two principles have been established:

> (1) Where the application of the procedural rule is not mandatory, but rather is discretionary with the State courts—

> * * * we are not concluded [sic] from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right. A state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner. (*Williams* v. *Georgia*, 349 U.S. 375, 383 (1955); footnote omitted.)

(2) Even where the application of the State procedural rule is mandatory—

> * * * a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights. (*Henry* v. *Mississippi*, 379 U.S. 443, 447-448 (1965); footnote omitted.)

In this case, there are three grounds to support this Court's jurisdiction to review the denial of petitioner's constitutional rights:

(1) The Appellate Court erred in finding that petitioner's constitutional rights have been waived, as a matter of Illinois law, because

(a) A failure to object at trial to instructions rendered erroneous by a subsequent change in the applicable law does not constitute a waiver;

(b) The complaint fails to state a cause

of action and may, therefore, be challenged at any time; and

(c) The constitutional issue was timely raised by petitioner's post-trial motion.

(2) Even if the constitutional question was not timely raised, the Appellate Court nevertheless had discretion to ignore the procedural defect and review the merits.

(3) Even if there was a waiver which the Appellate Court had no discretion to ignore, the enforcement of the procedural forfeiture in this case serves no legitimate State interest.

There Was No Waiver Under Illinois Law

While it is generally true that defenses (including constitutional arguments) not presented to the trial court are waived (App. 41),[4] there are certain well recognized exceptions to the general rule which the Appellate Court completely and unjustifiably ignored.

Failure to Object to the Trial Court's Ill Will Instructions in Anticipation of Garrison *Cannot Constitute a Waiver.*

One of these exceptions is that trial defects revealed by

[4] Although we do not question the Appellate Court's statement of the general rule, it should be noted that the *Pennsylvania Railroad, Department of Public Works, Zelney,* and *Lipsky* cases relied on by the Appellate Court (App. 41-43) are not pertinent. They were all decided prior to the inception of a whole new judicial procedure on January 1, 1964 (Ill. Const. Art. VI) and were based on the former procedure under which the Illinois Supreme Court had direct appeal jurisdiction in cases involving constitutional questions—but only if the record affirmatively showed that the constitutional question had been presented to *and* passed on by the trial court.

post-trial changes in the applicable law may be raised for the first time on appeal. *City of Chicago* v. *Kimmel,* 31 Ill. 2d 202, 207-209 (1964); *The People* v. *Bruce,* 31 Ill. 2d 459, 460-461 (1964); *People* v. *Rhodes,* 71 Ill. App. 2d 150 (4th Dist. 1966).

This, of course, is in accord with the Federal rule that no waiver of rights results from a failure to make an objection at trial in anticipation of a doctrine later announced by this Court. *O'Connor* v. *Ohio,* 385 U.S. 92 (1966); *Hormel* v. *Helvering,* 312 U.S. 552 (1941); *Uebersee Finanz-Korp.* v. *McGrath,* 343 U.S. 205 (1952).

While *Times* established that criticism of public officials is constitutionally privileged, absent a showing of actual malice, it was not until *five months after the trial in this case* that this Court held that neither ill will nor negligence could constitute actual malice in the constitutional sense. *Garrison* v. *Louisiana,* 379 U.S. 64, 73-74, 79 (1964).

In holding that ill will and negligence instructions strikingly similar to those given in this case were clearly improper, this Court cites Garrison *not* Times. *Rosenblatt* v. *Baer,* 383 U.S. 75, 83-84 (1966).

Even the Appellate Court in this case seems to recognize that it was *Garrison* that wrought the change in the definition of actual malice:

> A *later* United States Supreme Court decision, Garrison v. Louisiana, 379 U.S. 64, held that neither intent to injure nor lack of due care was sufficient to meet the constitutional test of the *Times* case, and that only an intent to injure through the calculated use of a falsehood or the reckless disregard of truth would destroy the constitutional protection. (App. 35-36; emphasis supplied.)

Moreover, the *Garrison* result was by no means predictably clear from the *Times* opinion. In *Times* the Court rejected an Alabama rule that truth was the only defense in a case of libel *per se,* holding that where a public official is involved the mere falsity of a defamatory advertisement printed by the New York Times was not enough and that either knowledge or reckless disregard of falsity must be established. *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 279-280 (1964). Whether proof of ill will would also suffice was not before the Court and was not discussed, for there was no element of personal animosity in the case. Thus, as a matter of *stare decisis, Times* only stood for the proposition that, in order to hold a newspaper liable for merely printing a false and defamatory advertisement, a showing of knowledge or reckless disregard of falsity was required.

Furthermore, the *Times* opinion discussed, approvingly, *Coleman* v. *MacLennan,* 78 Kan. 711 (1908), as announcing a rule similar to that adopted by the Court in *Times;* and yet *Coleman* had applied the classic State court ill will definition of actual malice—the natural inference being that the Court approved of that definition. Indeed, subsequent to *Times,* the highest courts in two States ruled that, because of this, *Times* had not altered their previous ill will concept of actual malice. *Kennedy* v. *Mid-Continent Telecasting, Inc.,* 193 Kan. 544 (1964); *Baer* v. *Rosenblatt,* 106 N.H. 26 (1964), reversed, 383 U.S. 75 (1966).

Since it was really *Garrison* that eliminated ill will as a test of actual malice in cases where the constitutional protection of *Times* applies, the failure of petitioner's counsel to object at trial to ill will instructions which were proper under existing Illinois law cannot constitute a waiver. Rather, the post-trial change in the applicable constitutional standard for proving actual malice completely justified raising the point for the first time on appeal under Illinois law, as well as under Federal law.

The Complaint Fails to State a Cause of Action and May, Therefore, Be Challenged at Any Time.

Even if it had been clear, at the time of trial, that *Times* itself had abolished ill will as a constitutionally permissible definition of actual malice, petitioner was not precluded from asserting his constitutional rights for the first time on appeal because of the Illinois rule that *the total failure of a complaint to state a cause of action can be raised at any time. Wilson* v. *Board of Education,* 394 Ill. 197, 201 (1946); *Gustafson* v. *Consumers Sales Agency,* 414 Ill. 235, 241 (1953); *Grizzard* v. *Matthew Chevrolet,* 39 Ill. App. 2d 9, 17 (4th Dist. 1963). The rule was concisely stated in *Wagner* v. *Kepler,* 411 Ill. 368, 371 (1951):

> While defects in a complaint containing an incomplete or otherwise insufficient statement of a good cause of action may be waived, the question of whether a complaint absolutely fails to state or indicate any ground of liability which the law will recognize can be raised at any time.

The complaint in this case does not allege that petitioner's letter was written with knowledge or reckless disregard of falsity; it merely alleges, generally, that petitioner acted "maliciously," intending to destroy respondents' good reputations (R. 2, ¶ 5)—and a general allegation that a defendant was motivated by malice is no longer sufficient to state a cause of action if the letter is constitutionally privileged under *Times* and *Garrison. Lundstrom* v. *Winnebago Newspapers, Inc.,* 58 Ill. App. 2d 33, 36 (2d Dist. 1965); *Proesel* v. *Myers Pub. Co.,* 48 Ill. App. 2d 402, 405 (1st Dist. 1964); *Cabin* v. *Community Newspapers, Inc.,* 50 Misc. 2d 574 (N.Y. S.Ct. 1966).

To summarize: If, as a matter of substantive law, petitioner's letter is constitutionally privileged because respond-

ents are "public officials," he has not waived the privilege because either *Times* itself rendered the complaint utterly defective to state a cause of action or *Garrison* effected a significant post-trial change in the applicable law. In either case, under Illinois law, the defect can be raised for the first time on appeal.

The Error in the Negligence Instructions Was Properly Preserved for Appeal.

It will be recalled that the instructions which permitted the jury to infer actual malice from such circumstantial evidence as failure to make a proper investigation were objected to at the conference on instructions, though not on constitutional grounds. (R. 49,58-59, Instructions 4 and 7.) In the post-trial motion, the objection to these instructions was renewed and an objection to the denial of petitioner's constitutional rights was made, though the two objections were not specifically related and the constitutional argument was not articulated. *However, as shown by the affidavit of counsel, the* Times *case was specifically called to the trial court's attention during the unreported hearing on the post-trial motion.* (App. 48.)

Under these circumstances, the constitutional defects in the negligence instructions were properly raised in the trial court and preserved for appeal. The Illinois courts have held that in order to object to erroneous instructions on appeal it is only necessary that they be objected to in the conference on instructions and objected to, by number, in the post-trial motion. *Pajak* v. *Mamsch,* 338 Ill. App. 337, 343-346 (1st Dist. 1949); *Chism* v. *Decatur Newspapers, Inc.,* 340 Ill. App. 42, 47 (3d Dist. 1950); *Rudolph* v. *City of Chicago,* 2 Ill. App. 2d 370, 374-375 (1st Dist. 1954); *Goodman* v. *Motor Products Corp.,* 22 Ill. App. 2d 378, 386-387 (2d Dist. 1959).

Moreover, there is no requirement that the grounds for objection be articulated or that the cases relied upon be cited. In *Tabor* v. *Tazewell Service Co.*, 18 Ill. App. 2d 593 (3d Dist. 1958), the court rejected a contention that the propriety of certain jury instructions was not properly preserved for appellate review because they were merely identified by number in the post-trial motion and no grounds in support of the objections were stated. The court said (18 Ill. App. 2d at 601):

> While a post trial motion must specify the errors relied upon, it need not be a brief or argument.

Even if an elaboration of the claim of denial of petitioner's constitutional rights was required, it was supplied by the argument on the post-trial motion. The fact that the argument was not reported, and, therefore, is not a part of the official record, is not material, for affidavits may be used to supply significant facts which are outside the record. *Williams* v. *Georgia*, 349 U.S. 375, 379-380 (1955); *Henry* v. *Mississippi*, 379 U.S. 443, 450 (1965); *Curtis Publishing Co.* v. *Butts*, 351 F.2d 702, 733 (5th Cir. 1965), certiorari granted, 385 U.S. 811 (1966).

The Appellate Court Had Discretion to Review the Merits Regardless of a Technical Waiver

In order to mitigate the harshness of the general waiver rule in particular cases, the Illinois courts have a residual discretionary power to consider assignments of error for the first time on appeal where necessary to insure a fair trial. In *Belfield* v. *Coop*, 8 Ill. 2d 293, 313 (1956), the Court said:

> If prejudicial arguments are made without objection of counsel or interference of the trial court to the extent that the parties litigant cannot receive a

> fair trial and the judicial process stand without deterioration, then upon review this court may consider such assignments of error, even though no objection was made and no ruling made or preserved thereon.

See, also, *City of Chicago* v. *Pridmore,* 12 Ill. 2d 447, 453 (1957); *City of Quincy* v. *Best Supply Co.,* 17 Ill. 2d. 570, 577 (1959); *Muscarello* v. *Peterson,* 20 Ill. 2d 548, 555 (1960); *Underwood* v. *Pennsylvania Ry. Co.,* 34 Ill. 2d 367, 371 (1955).

While these cases all involved improper conduct of counsel, there is nothing to indicate that the Illinois courts do not have similar discretion to ignore the waiver rule whenever necessary to correct an error so egregious as to deprive a party of a fair trial. Indeed, the waiver rule has been ignored in a case which is closely analogous to the case at bar. In *People* v. *Bender,* 20 Ill. 2d 45, 54 (1960), the Court held that the fair trial exception to the waiver rule applied to erroneous instructions, even though (as in this case) the appellant himself had requested some of the instructions:

> The State further contends that some of the erroneous instructions were given at the request of defendant and that he is therefore in no position to complain. While such a rule is normally applicable in cases involving mere error, it will not operate to deprive an accused of his constitutional right to due process of law. (Cf. *People* v. *Burson,* 11 Ill.2d 360, 370.) When the State, the defense, and the court, all proceeded on an entirely erroneous belief that the burden of establishing insanity rested upon the defendant, it was impossible for the defendant to receive a fair and impartial trial according to the law of this State.

Here, as in *Bender*, the trial court's instructions were based upon a fundamental misconception, by both court and counsel, of the applicable law. Because of *Times* and *Garrison*, the only issue was whether petitioner's bribery accusation was made with knowledge or reckless disregard of falsity; and yet the jury was told that the issue was whether petitioner wrote his letter out of ill will, intending to injure respondents—a state of mind which could be inferred from negligence in investigating the facts, the mere falsity of the accusation, and the language of the letter. (R. 58-59, 62.)

Just how improper these instructions were—and how greatly they deviated from the *Times-Garrison* rule—is illustrated by the fact that *petitioner was found guilty of having written his letter with actual malice, even though he did not even know respondents and had no reason to bear them any personal animosity.*

In order to affirm the verdict, even under the pre-*Times* ill will rule, the Appellate Court had to grasp at language in the letter which merely reflected petitioner's mistaken, *but honest*, belief that two nameless police officers had solicited a bribe and should be disciplined accordingly. (App. Ct. Op., App. 45-47.)

That petitioner did not have a fair trial because of these grossly erroneous instructions is illustrated by the fact that the jury awarded "compensatory" damages of $10,000 to each respondent simply because, in the words of the Appellate Court (App. 34):

> The evidence in this case showed that it was common knowledge at the North Park Station that plaintiffs had been accused of taking a bribe, and they were shunned by their fellow officers and the wives of their fellow officers, which caused them considerable mental anguish. This despite the fact that they were completely exonerated.

One wonders how much these verdicts were influenced by the fact that respondents' counsel was allowed to show that petitioner was a partner in the investment firm of Francis I. du Pont and President of a holding company which owns the Chicago White Sox and the jury was instructed that they could consider petitioner's wealth in fixing the amount of damages. (R. 33, 59-60.)

Under the circumstances, the trial court's instructions were so erroneous as to constitute substantial error which the Appellate Court had discretion to correct under the fair trial exception to the waiver rule.

The Appellate Court's Application of the Waiver Doctrine Served No Legitimate State Interest

Even if this were a case of waiver which the Appellate Court had no discretion to excuse, review of the constitutional issue by this Court is not barred because, under the rule established by *Henry* v. *Mississippi*, 379 U.S. 443, 447-448 (1965), the Appellate Court's insistence on a procedural forfeiture does not serve any legitimate State interest.

The State admittedly has an interest in precluding a litigant from trying his case twice on different theories and in protecting its appellate courts from having to pass on arguments not presented to the trial court. *But that interest is not served by declaring a forfeiture of a substantial Federal right because of the understandable failure of petitioner's counsel to raise the constitutional issue at trial.*

This is not a case where, for reasons of trial strategy, counsel chose not to raise the constitutional issue. *It is a case where a lawyer practicing in the Chicago Municipal*

Court simply was not aware that his client's letter may have been clothed with a Federal, as well as a State, privilege because of a Supreme Court decision handed down three months before trial.[5]

And even if he could be charged with negligence for not having noticed the *Times* case, though it surely could not have been discovered through the normal research procedure at that early a date, *would he also have been expected to be sufficiently clairvoyant to foresee that* Garrison *would later announce a standard for proving actual malice which was different from the classic ill will definition impliedly approved by* Times?

Under these circumstances, where there is no *intentional* relinquishment of a *known* right or privilege and no "deliberate by-passing of state procedures" (*Fay* v. *Noia*, 372 U.S. 391, 438-439 (1963)), no legitimate state interest is served by insisting on a procedural forfeiture.

By the time of the conference on instructions, respondents had presented all of their evidence on actual malice and had rested their case, so they could not have been prejudiced in the presentation of their case by petitioner's failure to object at that time.

Moreover, *Times* was brought to the Trial Judge's attention in the argument on petitioner's post-trial motion, while

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[5] Although the Appellate Court cites *Curtis Publishing Co.* v. *Butts*, 351 F.2d 702 (5th Cir. 1965), certiorari granted, 385 U.S. 811 (1966), in the course of its discussion of the waiver issue (App. 42), *Butts* is totally inapplicable here, for the Fifth Circuit's ruling was based on the premise that, because Curtis was represented by the same eminent counsel who represented the New York Times in the *Times* case, there was an *intentional* relinquishment of a *known* right or privilege. No such conscious waiver is present here because even the Appellate Court recognized that petitioner's trial counsel was not aware of *Times*. (App. 36.)

he still had control of the case and could have rendered judgment notwithstanding the verdict because there was no evidence that petitioner's letter was written with knowledge or reckless disregard of falsity.

Finally, even at the appellate level, recognition of petitioner's constitutional rights would not have raised the spectre of a new trial because the Appellate Court was required to review the evidence in the record to determine whether it could constitutionally support a judgment for respondents and (if it could not) to reverse, *without remand,* for lack of evidence that the statements in petitioner's letter were made with the "high degree of awareness of their probable falsity" required by *Garrison, New York Times Co.* v. *Sullivan,* 376 U.S. 254, 284 (1964); *Garrison* v. *Louisiana,* 379 U.S. 64, 74 (1964).

The propriety of this procedure has been recognized by the Illinois Supreme Court in the closely analogous situation of a change in the constitutional standard for judging obscenity made by a decision of this Court after trial. *People* v. *Bruce,* 31 Ill. 2d 459 (1964); *City of Chicago* v. *Kimmel,* 31 Ill. 2d 202, 207-208 (1964).

Thus, neither respect for orderly judicial process nor avoiding prejudice to respondents demands a forfeiture of petitioner's constitutional rights in this case.

Respectfully submitted,

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APPENDIX

Opinion Filed October 6, 1966

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

No. 50345

ROBERT J. FLANNERY and WILLIAM MOORE, **Plaintiffs-Appellees,** **v.** **ARTHUR C. ALLYN, JR.,** **Defendant-Appellant.**	Appeal from the Circuit Court of Cook County, Illinois, First Municipal District.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This involves an appeal seeking to reverse judgments entered against the defendant in favor of each of the plaintiffs in the amount of $10,000 in an action of libel.

This case was previously tried and appealed to this court, and the judgments were reversed and the cause remanded to the trial court. *Flannery* v. *Allyn,* 47 Ill. App. 2d 308, 198 N.E.2d 563. In the first appeal this court held that the letter of the defendant relating to the plaintiffs was a qualifiedly privileged communication and that the plaintiffs were required to prove actual malice to justify a recovery.

The defendant raises two points, (1) the trial court applied a constitutionally defective definition of actual malice, and (2) the judgments should be reversed, without remand, for lack of clear and convincing proof of actual malice.

The plaintiffs in their brief contend that the defendant cannot urge for the first time in the appellate court defenses based upon any constitutional issues since they were not raised in the trial court, and were not properly preserved for review; that the defendant is restricted to the theory upon which the case was tried in the trial court, and cannot shift his theory or assume a different position in the appellate court; that the plaintiffs were members of a police force and were not public officials within the meaning and purview of the United States Supreme Court decisions, and the application of these decisions in no way applies to them; that the issue of whether the defendant was or was not guilty of actual malice is a question of fact to be determined by the jury; that actual and express malice may be shown by failure to make a proper investigation, ill will, mode and extent of publication and falsity of publication, and that since the jury was directed by defendant's peremptory instruction, that in order for them to find in favor of the plaintiffs, they must find that the defendant was actuated by actual malice in writing the letter, it must be conceded that the jury by the verdicts in favor of the plaintiffs found that defendant was actuated by actual malice.

The pertinent facts in this case are the following:

On July 21, 1958, the defendant dictated and sent the following letter to Chief George Otlewis of the Chicago Park District:

"Chief George Otlewis
Police Division
Chicago Park District
Administration Building
425 East 14th Boulevard
Chicago 5, Illinois

Prior to noon on March 23rd on the Outer Drive, the officers driving Police Car #920, license #M7716, solicited a check from my daughter, a copy of which is enclosed, when the car in which she was riding was stopped, for 'speeding.' When she asked the officers to whom the check should be made, they said, 'cash, what else.' The check was pre-dated March 22nd because the 23rd was a Sunday. Further, this solicitation was done in front of witnesses.

I regret having to advise you of this situation at such a late date, but you will note that the check was not put through the bank until the 31st, and since my daughter is away at school, and we just recently returned from a trip to [redacted]ji, there was no opportunity to present this matter until now. I expect disciplinary action to be taken promptly.

The newspapers have not been advised, and I have no intentions at the present time of doing so.

A. C. ALLYN, JR. (Signed)

A. C. Allyn, Jr.
djd"

In July, 1958, while helping his daughter, Dorothy, balance her bank statement, the defendant, Allyn, saw a check drawn by his daughter in the amount of $15.00, payable to cash, and bearing an endorsement of a bar on North Clark Street. There was no other endorsement on the check. The defendant asked his daughter for an explanation. Dorothy said that she had given the check

to a policeman in payment of a "fine" when a car driven by Paul Power, in which Dorothy and Sue Owens were passengers, had been stopped on the Outer Drive for speeding. Dorothy told her father that the fine was $25.00 but that Power had only $10.00, and she wrote a check for $15.00 to make up the difference. The testimony of the defendant and his daughter are contradictory as to whether the check was given to the policeman on the Outer Drive or outside of the Park District Police Station. However, the defendant, in his brief, under the heading "What Actually Happened" states the following:

> *"What Actually Happened*
>
> What actually happened was that Paul Power did not have his driver's license and, consequently, plaintiffs had him drive to the North Park District Station in Lincoln Park for booking. There, Officer Moore issued him a ticket for speeding and cash bail was fixed at $25. Power had only $10 and Dorothy and Sue had no money. Dorothy asked if she could write a check for the difference, but was told that the Police Department did not accept checks. She tried to cash a check in the neighborhood, but, it being Sunday morning, was unable to do so. Finally, although not a customary thing to do, Officer Flannery decided to help the young people and personally cashed her check. Power was thus able to make bond and avoid being locked up overnight."

When Allyn's letter was received Chief Otlewis turned it over to Captain Northen for investigation and recommendation. It was determined that plaintiffs were assigned to car 920 on March 23rd, the date referred to in the Allyn letter. An investigation was conducted and it was determined that a ticket had been issued to Power and that Power had posted bond. Captain Northen then

called Chief Otlewis and said he was forwarding a report with the recommendation that the plaintiffs should be commended rather than disciplined. Captain Northen also called the defendant telling him of what he had learned, and Allyn said that he would not be satisfied until he had checked the story with Paul Power, who was still in Canada. On July 21, 1958, Allyn was unable to reach Paul Power, the driver of the car which had been stopped for speeding, since he was in Canada and could not be reached by telephone or telegraph. After talking to Power, Allyn told Captain Northen that he would write Chief Otlewis withdrawing his complaint. On August 28, 1958, the defendant wrote the following letter to Chief Otlewis of the Chicago Park District:

"Chief George A. Otlewis
Chicago Park District
Administration Building
425 East 14th Blvd.
Chicago 5, Illinois

Please refer to my letters to you dated July 21st and July 28th of this year.

I have now had an opportunity to discuss the matters contained in those letters in detail with the driver of the vehicle. It is now clear that the apparent infraction of the rules by your officers arose from a failure on the part of the driver of the vehicle, and also on the part of the officers not to disclose to my daughter the nature of the solicitation of her check. The officers involved did generously offer to the driver of the vehicle to cash a check to permit the driver to put up the necessary bond. The bond was put up and a receipt was given therefor.

I do not think that it was wise for the officers to cash a personal check, but I must say that it

was quite generous of them to do so. Thank you for your cooperation in this regard.

A. C. ALLYN, JR.

A. C. Allyn, Jr.
djd
cc: Captain John Northen"

In the previous appeal in this case it was pointed out by us that only one interpretation could be placed upon the letter, namely, that the defendant was accusing the officers of soliciting and accepting a bribe, which amounts to an imputation of the commission of a crime, and it was also held in the previous case that many police officers in the police station, who were not assigned to investigate the matter, read the defendant's letter, and that the persons who read the letter knew that it referred to the plaintiffs. There is no doubt as to the publication of the letter.

In the previous opinion in this case, *Flannery* v *Allyn, supra,* on page 319 we said:

> "In a case where there is a qualified privilege and malice is therefore not inferred, the burden of proving malice is upon the plaintiff, and this must be proven to the satisfaction of the jury. This case must be retried because we hold that the letter was qualifiedly privileged, and therefore the jury must determine whether or not there was actual malice on the part of the defendant."

The evidence in this case showed that it was common knowledge at the North Park Station that plaintiffs had been accused of taking a bribe, and they were shunned by their fellow officers and the wives of their fellow officers, which caused them considerable mental anguish. This despite the fact that they were completely exonerated.

The plaintiffs in their brief argue that the defendant cannot in the appellate court for the first time urge defenses which were not properly presented to the lower court, and that defendant's failure to raise the constitutional defenses at the trial constitutes a complete waiver of such constitutional defenses. The plaintiffs also point out that the defendant at no time presented to the trial court any defenses based on constitutional issues. We believe that we must discuss this point at the outset. The constitutional issues referred to by the defendant arise out of the decision of the United States Supreme Court in *New York Times Co.* v. *Sullivan,* 376 U.S. 254, decided March 9, 1964. This was a libel action, brought by the Montgomery, Alabama Commissioner of Police, based upon a full page advertisement appearing in the Times, which contained false statements concerning the handling of racial demonstrations by the Montgomery police. A check of the Times' own files would have shown some of the statements in the advertisement to be false and no effort was made by the Times to confirm the factual accuracy of the statements in the advertisement. The Supreme Court of the United States in that case resolved a conflict among the libel laws of the various states regarding criticism of public officials by holding that the free speech and free press guarantees of the First Amendment to the Constitution are applicable in measuring the permissible scope of the civil libel laws of the States, and that the constitutional guarantees require a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statment was made with actual malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

A later United States Supreme Court decision, *Garri-*

son v. *Louisiana,* 379 U.S. 64, held that neither intent to injure nor lack of due care was sufficient to meet the constitutional test of the *Times* case, and that only an intent to injure through the calculated use of a falsehood or the reckless disregard of truth would destroy the constitutional protection.

The basis of the constitutional privilege set up by the Supreme Court of the United States in the *Times* case, *supra,* related to a public official and there can be little doubt that a Commissioner of Police, who was an elected official, is a public official. The question of whether police officers or patrolmen can be considered public officials is one of the issues raised in this case on appeal, but that issue can be reached only if defendant has not waived the constitutional privilege by failing to present a defense based thereon during the trial. The case of *New York Times Co.* v. *Sullivan, supra,* was decided approximately three months prior to the second trial in this case, but apparently did not come to the attention of the attorney who tried the case for the defendant in the trial court, and the definition of malice as therein set forth was not presented to the court on the trial of this case. The question of whether the plaintiffs were public officials was not raised by the defendant, was not in issue and was not decided by the trial court in this case.

The defendant contends that plaintiffs' instructions 4 and 7 permitted the jury to infer actual malice from circumstantial evidence, such as failure to make a proper investigation, ill will, mode and extent of publication and falsity. Plaintiffs' instruction 4 was as follows:

> "A fact may be proved by circumstantial evidence. Circumstantial evidence consists of proof of facts or circumstances which give rise to a

reasonable inference of the truth of the fact sought to be proved."

aintiffs' instruction 7 was as follows:

"The Court instructs the Jury that you may take into consideration evidence, if any, of failure to make a proper investigation, ill will, mode and extent of publication and falsity as tending to show actual or express malice."

The attorney for the defendant objected to plaintiffs' instruction 4 on the basis that there was no circumstantial evidence in the record showing any personal animosity or ill will between the parties. This objection was overruled. The attorney for the defendant, likewise, objected to plaintiffs' instruction 7 in that he said it was not a proper statement of the law in this case, and added, "The Appellate Court has ruled that this is a qualifiedly privileged communication and that, in order for the plaintiff to sustain his action, he must prove actual malice." The objections to plaintiffs' instructions 4 and 7 did not raise a constitutional privilege under the First Amendment to the Constitution of the United States. This objection, of course, would be material only if the plaintiffs were public officials.

The court gave the following two peremptory instructions at the request and on behalf of the defendant, as follows:

"Instruction #2

The Court instructs the Jury that the letter sued upon in this case is a qualifiedly privileged communication and you are directed to find for the defendant unless you find from the evidence that defendant was actuated by actual malice in making such communication. In this connection

you are instructed that the burden of proof is upon the plaintiff to establish by a preponderance of the evidence that defendant was actuated by actual malice in writing the letter. You are further instructed that actual malice means ill will or any wrongful or wicked motive which prompts or induces the act complained of."

Instructions 9 reads as follows:

"The term 'malice' is applied to a wrong which is inflicted with an evil intent, design or purpose and implies that the guilty party was actuated by improper or dishonest motives and intended to perpetrate an injury or wrong on another.

"In order to sustain this action for libel, it must be proved by a greater weight of all the evidence that the letter was written by the defendant with malice and, if not so proved, you should find for the defendant."

The court also at the defendant's request gave the following instruction:

"Instruction #6

'Malice in fact' means ill will towards a particular person, an actual intention to injure or defame him, and in the instance of a qualifiedly privileged communication, an action cannot be sustained without proof of actual or express malice — malice in fact."

By these three instructions the jury was directed to find for the defendant unless it found from the evidence that the defendant was actuated by actual malice in writing the letter.

Both the plaintiffs' and defendant's instructions were based upon the law of Illinois relating to actual malice, and the case was tried below on that theory.

> "Actual malice may be inferred from falsity, absence of proper cause or other relative circumstances, or it may be deduced from the libel itself or from the communication of which it forms a part, and all circumstances surrounding the transactions are proper for consideration, including the failure to make a proper investigation." I.L.P. Vol. 33, Slander and Libel, sec. 114, page 427.

In *Van Norman* v. *Peoria Journal-Star, Inc.*, 31 Ill. App. 2d 314, 175 N.E.2d 805, the court said on page 327:

> "The existence of actual malice may be inferred where a defamatory publication is made without proper cause or excuse, (John vs. Tribune Co., 28 Ill. App. 2d 300, 316, 171 N.E.2d 432, 441) or from falsity, absence of proper cause or other relative circumstances or it may be deduced from the libel itself, or from the communication of which it forms a part."

The court continued on page 330:

> "Instruction No. 19 told the jury 'that you may take into consideration the evidence, if any, of failure to make proper investigation, ill-will, repetition of the libel, mode and extent of publication, and falsity as tending to show actual or express malice.' The objection to this instruction is that it improperly uses the word 'ill-will' and also the phrases 'extent of publication' and 'a proper investigation' and leaves to the jury too wide a latitude to conjecture whether the evidence shows actual malice. The criticism of the use of the words 'ill-will' and 'extent of publication' was not made at the conference on instructions. In Cook v. East Shore Newspapers, Inc., 327 Ill. App. 559, 64 N. E. 2d 751, it is said: (p. 590) 'The existence of malice may be inferred. Actual malice may be inferred from

falsity, absence of proper cause, or other relative circumstances, or it may be deduced from the libel itself, or from the communication of which it forms a part. All circumstances surrounding the transaction are proper for consideration, including the failure to make a proper investigation.' In the instant case the defamatory article was admittedly false and there is evidence in the record of the other enumerated items which this instruction told the jury they were authorized to take into consideration in determining whether defendant was actuated by express malice. There is no merit in defendant's objection to this instruction."

In *Cook* v. *East Shore Newspapers, Inc.*, et al., 327 Ill. App. 559, 590-591, 64 N.E.2d 751, the court said:

"The existence of malice may be inferred. Actual malice may be inferred from falsity, absence of proper cause, or other relative circumstances, or it may be deduced from the libel itself, or from the communication of which it forms a part. All circumstances surrounding the transaction are proper for consideration, including the failure to make a proper investigation. (33 Am. Jur. pp. 247 to 251, chapter on Libel and Slander, pars. 266 and 267. In the case of *Chambers* v. *Leiser*, 43 Wash. 285, 86 Pac. 627, 10 Ann. Cas. 270, 54 A.L.R. 1148, the court said:

'It was therefore incumbent upon plaintiff, by means of the matters in the letter or by any other competent evidence, to show that defendant had been actuated by malice or ill will towards plaintiff, or had included in said communication false and libelous matters, not pertinent or reasonably necessary to the subject matter which it was defendant's privilege to communicate, or that defendant had not made reasonable inquiry and investigation, but had written recklessly or knowingly, falsely and not

> in good faith; and upon establishing any of these matters, the plaintiff would have been entitled, on account of the presumption of malice, falsity, and injury arising from the matter libelous per se, to recover, unless the defendant should have established the truth of the letter's libelous contents.'"

There can be no doubt but that this case was tried on the theory that the letter sent by the defendant was qualifiedly privileged and that actual malice had to be shown by the plaintiffs, and from the record before us it cannot be said that the defendant relied upon a constitutional privilege, and the failure of the defendant to raise constitutional defenses at the trial constituted a waiver of such constitutional defenses.

> "The general rule repeatedly adhered to by the Illinois courts is that issues, points, or contentions not presented in the trial court and properly preserved for review will not be considered on appeal. Stated in another way, the action of the trial court in failing to do what it was never asked to do cannot be assigned as error.
>
> • • •
>
> The general rule that questions not presented in the trial court will not be considered on appeal applies to constitutional questions. Accordingly, the question of the constitutionality or validity of a statute, or the question of the constitutionality or validity of a municipal ordinance, or rule of the court, will not be considered by the reviewing court where the question was not raised in the trial court." I.L.P. Vol. 2, Appeal and Error, Section 181.

In *Pennsylvania Railroad Co.* v. *Illinois Brick Co.*, 297 U.S. 447, the Supreme Court found that no constitutional question was, by answer, motion or otherwise, expressly

raised in the trial court. The case was taken directly to the Supreme Court of Illinois and was transferred by that court to the appellate court. The order of transfer did not specify the grounds on which it was based, but the petitioner stated that the Supreme Court necessarily held the constitutional questions had not been properly raised and that on the oral argument, the Chief Justice stated that the transfer would be made because of petitioner's failure properly to raise and preserve the constitutional questions. The court then stated: "As the highest court of the State declined to consider them because not raised in the circuit court or presented to it in accordance with practice that unquestionably was well established and reasonable, this court is without jurisdiction to consider either of them."

In *Kioutas* v. *City of Chicago,* 59 Ill. App. 2d 441, 208 N.E.2d 587, this court held that a party will not be permitted to argue on appeal a defense not interposed by his answer, and further, the theory upon which the case is tried below may not be changed on review.

In *Curtis Publishing Company* v. *Butts,* 351 F.2d 702, the court held that a defendant waived any right it may have on appeal to challenge the verdict and judgment on any of the constitutional grounds appearing in *New York Times Co.* v. *Sullivan,* 376 U.S. 254, where it had failed to raise the defenses based on constitutional issues in the trial court. The court in the *Butts* case, *supra,* on page 711 said:

> "Without expressing any opinion as to whether Times fundamentally changed the substantive law applicable to libel cases, or whether the charge on malice given by the trial court was adequate under Times, or whether Butts was the kind of 'public official' contemplated by Times, or whether a reversal might otherwise be re-

> quired if the constitutional issues had been timely presented, we hold that Curtis has clearly waived any right it may have had to challenge the verdict and judgment on any of the constitutional grounds asserted in Times."

See also *Department of Public Works and Buildings* v. *The Chicago Title and Trust Company,* 408 Ill. 41, 95 N.E.2d 903; *Zelney* v. *Murphy,* 387 Ill. 492, 56 N.E.2d 754; *People* v. *Lipski,* 390 Ill. 70, 60 N.E.2d 422.

The court in giving defendant's instruction #2, hereinbefore set forth, defined actual malice as meaning ill will or any wrongful or wicked motive which prompts or induces the act complained of. That instruction was not based upon *Times'* definition of actual malice, namely, that the defamatory falsehood relating to a *public official* is constitutionally privileged unless plaintiff proves actual malice on the part of the defendant, that is, with knowledge of its falsity or with reckless disregard of whether it was false or not. We must, in view of the foregoing, conclude that the constitutional privilege sought to be urged by the defendant at this time has been waived by his failure to preserve the question by answer, motion, or in any other manner, in the trial court.

It will be unnecessary for the purpose of this opinion, therefore, to decide whether the two plaintiffs, who were policemen, come within the category of public officials, as was contemplated by the Supreme Court of the United States in *New York Times Co.* v. *Sullivan, supra.*

We next consider the question whether the evidence adduced by the plaintiffs in this case was, as a matter of law, sufficient to support a finding of actual malice by the jury.

The defendant contends that the trial court's definition

of malice was grossly insufficient in that the court instructed the jury that it could take into consideration "failure to make the proper investigation," "ill will," "mode and extent of publication," and "falsity" as tending to show actual or expressed malice. The defendant also contended that the only proper instruction would have been that set forth in *New York Times Co.* v. *Sullivan, supra,* wherein the Supreme Court said on page 279:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

As we have heretofore pointed out, the constitutional privilege was waived in this case, and the case was tried on the basis of actual malice as defined by Illinois courts. In our previous opinion in this case (*Flannery* v. *Allyn,* 47 Ill. App. 2d 308, 319, 198 N.E.2d 563), we cited from the case of *Gassett* v. *Gilbert,* 6 Gray (Mass.) 94, 54 ALR 1149, wherein the following was said:

> "The sole duty of the court, therefore, in such cases, is to determine whether the occasion, in the absence of actual malice, would justify the publication. If so, then it is incumbent on the plaintiff to prove the existence of malice, in order to sustain his action; and this must be shown to the satisfaction of the jury, whose exclusive province it is to pass upon the question. But it is not necessary to prove it by extrinsic evidence. It may be inferred from the relation of the parties, the circumstances attending the publication, and even from the terms of the publication itself."

In *Adair* v. *Timblin*, 186 Ill. App. 133, the court stated that to find that a communication is qualifiedly privileged means no more than that the occasion of making it rebuts the prima facie inference of malice arising from the publication, and places on the plaintiff the onus of proving malice in fact; but not proving it by extrinsic evidence only; he has still the right to require that the alleged libel itself be submitted to the jury to judge whether there is evidence of malice on the face of it.

In the letter of July 21, 1958, addressed to Chief Otlewis the defendant accused the plaintiffs of soliciting the check from his daughter, and then made the inference that there had been no traffic violation which would have justified the plaintiffs stopping the car, since he placed the word "speeding" in quotes. There is no evidence in this case that Paul Power was not speeding at the time he was stopped by the plaintiffs on the Outer Drive. The defendant then proceeded in his letter to state "when she asked the officers to whom the check should be made, they said, 'cash, what else.'" There is no evidence in this case that the police officers used the phrase "cash, what else."

The testimony of Dorothy Allyn and Sue Owens, the other occupant of the car, was that when the officer had agreed to cash Dorothy Allyn's check she asked how the check should be made out and the officer said to make it out to cash. The defendant must have known that the phrase "cash, what else" was not correct, or there would have been some evidence offered in the trial of this case to cover that phrase. It was possible for the jury to believe that by using that type of language the defendant sought to do harm to the plaintiffs, and was motivated by actual malice. The defendant in the same letter stated, "I expect disciplinary action to be taken promptly," and "The newspapers have not been advised, and I have no

intentions at the present time of doing so," which would tend to show that the defendant had already adjudicated the guilt of the plaintiffs in his mind. The implication in the letter is clear that if the plaintiffs were not disciplined the defendant was going to divulge his story to the newspapers, and that Chief Otlewis should take immediate action. Even the letter of August 28, 1958 written by the defendant to Chief Otlewis, after the defendant had determined that the plaintiffs had not been guilty of any wrongdoing but had done a favor for his daughter, could have been construed by the jury as showing actual malice. In it the defendant said, "It is now clear that the apparent infraction of the rules by your officers arose from a failure on the part of the driver of the vehicle, and also on the part of the officers not to disclose to my daughter the nature of the solicitation of her check." The evidence does not disclose that any rule of the Police Department had been violated. One of the plaintiffs testified that the Desk Sergeant cashed as many as twelve checks a day, depending upon the persons. Also, the accusation by the defendant in his second letter to Chief Otlewis, wherein he again refers to the "solicitation of her check," could have been construed by the jury as evidence of malice on the part of the defendant. All of the evidence in this case, including the testimony of Dorothy Allyn and Sue Owens, was to the effect that the police officers had not solicited the check but that Dorothy Allyn suggested and volunteered to give a check.

In a pre-trial deposition of the defendant, which was read at the trial, the following questions were asked:

> "Q. Was it your intention, if you knew at the time they put up the money to make bond, you would never have written that letter?

A. I would not have written that precise letter, no.

Q. You would not ask in the letter these men be subjected to disciplinary action?

A. I am not sure exactly what I would have written.

Q. Mr. Allyn, would you have written that letter to Chief Otlewis that these men be subjected to discipline when they had done a favor for Mr. Power and indirectly to your daughter?

A. I have no idea what I would have written to them. I think I would have written them.

Q. And asked for disciplinary action?

A. That is possible, but I don't know."

As was pointed out in the previous opinion in this case, (*Flannery* v. *Allyn*, 47 Ill. App. 2d 308, 319, 198 N.E.2d 563) "In a case where there is a qualified privilege and malice is therefore not inferred, the burden of proving malice is upon the plaintiff, and this must be proven to the satisfaction of the jury. This case must be retried because we hold that the letter was qualifiedly privileged, and therefore the jury must determine whether or not there was actual malice on the part of the defendant." This the jury has done and the court properly entered judgments on the verdict.

Judgments affirmed.

Schwartz and Dempsey, JJ., concur.

[Appellate Court caption omitted]

AFFIDAVIT*

The undersigned, all members of the Bar of the Supreme Court of Illinois, being duly sworn, depose and say:

1. We were present during the argument on defendant's post-trial motion in the chambers of Judge Alvin J. Kvistad on October 14, 1964. Appearing for defendant was John T. Garrity and appearing for plaintiffs was John J. Burns, Jr.

2. Defendant's counsel argued that, particularly in light of the constitutional requirements of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), the instructions to the jury were erroneous and also that the evidence was insufficient to support the verdicts. Plaintiffs' counsel made no objection to the right of defendant's counsel to make the argument based on the *Times* case.

3. At the close of arguments for both parties, Judge Kvistad took defendant's post-trial motion under advisement and, at his request, defendant's counsel left with Judge Kvistad a copy of the Supreme Court's decision in the *Times* case.

4. John T. Garrity affirms that he did not become aware

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* Attached to Motion for Leave to File Affidavit (Certified Record, p. 505.) The executed original of the affidavit was tendered for filing, but is not a part of the Certified Record because the Appellate Court denied leave to file. (Certified Record, p. 513.)

of the Supreme Court's decision in Times until after the trial of this case on June 16-19, 1964.

JOHN T. GARRITY

BENJAMIN S. WARREN, JR.

EDWARD W. ROTHE

Subscribed and sworn to before me this _____ day of December, 1965.

Notary Public

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No. 1216

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In the

Supreme Court of the United States

OCTOBER TERM, 1966.

ARTHUR C. ALLYN, JR.,

Petitioner,

vs.

ROBERT J. FLANNERY and WILLIAM MOORE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

No. 1216

ARTHUR C. ALLYN, JR.,

Petitioner,

vs.

ROBERT J. FLANNERY and
WILLIAM MOORE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, is reported at 75 Ill. App. 2d 365, 221 N.E. 2d 89. The Supreme Court of Illinois denied petition for leave to appeal by summary order without opinion.

JURISDICTION

The judgment of the Appellate Court of Illinois, First District, was entered on October 6, 1966. A petition for leave to appeal was denied on January 18, 1967, by the Supreme Court of Illinois. Petition for writ of certiorari was timely filed on April 3, 1967, within ninety days. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (3).

QUESTIONS PRESENTED

1. Whether petitioner has waived any right to contest this judgment on constitutional grounds where no such constitutional defenses were raised in the trial court by any means available although the decision petitioner relies upon in this Court [*New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964)] was decided three months prior to the trial, and where petitioner attempts to explain this failure on the ground that his trial counsel was unaware of the decision.

2. Whether patrolmen, the lowest ranking members of the police force, patroling a beat under specific orders of their superiors, are public officials within the meaning of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) and subsequent Supreme Court decisions.

3. Whether petitioner was motivated by actual malice when he knew the contents of the libelous letter were false and wrote the letter with intent to harm the police officers.

Although the Petition is in unusual form, respondents will adopt petitioner's form in their brief for clarity.

THE HEART OF THE MATTER

This controversy concerns a libel by the petitioner against two patrolmen charging them, in writing, with the solicitation of a bribe, not with the honest belief that they committed the crime, but as the Appellate Court found, by translating known facts innocent in themselves into the charge of solicitation of a bribe.

Both substantively and procedurally this case presents the question whether a litigant, in a civil case, may shift his theory on appeal to an alleged violation of a constitutional right where the theory was not raised at trial,

although it was then in existence but allegedly unknown to his trial counsel. More specifically, the question here is whether a defendant in a civil action may raise as error instructions which were given at the insistence of the defendant himself.

There is absolutely nothing new or significant in this Petition. The Supreme Court of Illinois considered the issues so insignificant that it declined even to hear them.

STATEMENT

Respondents present their additional statement of facts to include certain omissions in petitioner's statement.

Petitioner wrote a libelous letter to respondents' superior on July 21, 1958, accusing them of soliciting a bribe from his daughter and demanding disciplinary action or he would go to the newspapers. It is undisputed that these charges were false.

It is also uncontradicted, and the Appellate Court specifically found, that when Mr. Allyn wrote the libelous letter accusing respondents of soliciting a check, he knew this was not true, but that his daughter had suggested and volunteered to give them the check. (R. 42-44) (App. Ct. Op., App. 46) and that it was always Paul Power, the driver, who said he needed the $15.00 and not the respondents (R. 41, 42, 45; Add'l. R. 12); that petitioner made the inference there had been no traffic violation by placing the word "speeding" in quotes although he had no knowledge that the car was not speeding; that he knew the words "cash, what else" were incorrect and used that language to do respondents harm (App. Ct. Op., App. 45); that although he had no evidence, he had already adjudged respondents guilty, and if they were not disciplined, he was going to divulge his story to the

newspapers (App. Ct. Op., App. 46); and that even if he knew respondents had done a favor for Mr. Power and indirectly for his daughter, it is possible that he would have written a letter and asked for disciplinary action. (App. Ct. Ap., App. 46-47).

On appeal, petitioner had asked for judgment [not a new trial] on the theory that the standard announced in *New York Times* v. *Sullivan* was applicable to this case. Petitioner argued that the jury was improperly instructed [including instructions tendered by the petitioner and given at his instance], and that the judgment should be reversed without remand for lack of clear and convincing proof of the actual malice. The Appellate Court held that petitioner waived his right to raise the alleged violation of his constitutional rights in the Appellate Court for his failure to raise the point in the trial court, noting that *Times* was decided approximately three months prior to the trial. The Court also found it was unnecessary to determine whether the plaintiffs, who were policemen, were public officials within the *New York Times* rule.

Petitioner then petitioned the Supreme Court of Illinois for leave to appeal, and this petition was summarily denied so that the only opinion of record is that of the Appellate Court to which petitioner brings this petition for writ of certiorari.

ARGUMENT

I.

THE APPELLATE COURT PROPERLY HELD PETITIONER FAILED TO PRESERVE THE CONSTITUTIONAL QUESTION BY FAILING TO RAISE IT BY ANSWER, MOTION, OR IN ANY OTHER MANNER IN THE TRIAL COURT.

So that the Record is clear, in the Appellate Court petitioner asked for a reversal of these judgments as a matter of law, and at no time requested a new trial. His contention was that the trial court applied a constitutionally defective definition of actual malice. (App. Ct. Op., App. 30). The Appellate Court, without deciding whether this case was within the doctrine of *New York Times* v. *Sullivan,* stated that in any event the point was waived because it was not properly preserved in the trial court.

Petitioner in Point II of this Petition attacks this decision for a variety of reasons.

A. Petitioner now says Garrison and not Times is the criterion.

Petitioner has now coined the constitutional privilege he seeks to apply as the "Times-Garrison" doctrine. In the Appellate Court it was termed the "Times decision" in his original brief and the "Times-Garrison-Henry" doctrine in the reply brief. But by whatever name the petitioner wishes to term the doctrine, decision or standard, there should be no dispute that it was established in *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), and that the decision was rendered three months prior to the trial of this cause. But, says petitioner, since the Court

in *Garrison* v. *Louisiana*, 379 U.S. 64 (1964) included in its language the fact that actual malice does *not* include ill will, the case which should govern waiver is *Garrison*.

A review of the decisions completely refutes this contention.

New York Times v. *Sullivan*, 376 U.S. 254 (1964), was decided March 9, 1964. In the decision, this Court reversed a libel judgment against the newspaper and spelled out the standard insofar as actual malice is concerned (376 U.S. at 279-280):

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—*that is, with knowledge that it was false or with reckless disregard of whether it was false or not.*" (Emphasis supplied.)

Next came *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), decided November 23, 1964. *Garrison* involved a criminal contempt proceeding of a District Attorney under a state criminal defamation statute for allegedly defaming certain state court judges. This Court struck down the statute and the conviction because the rule conflicted with the *New York Times* doctrine. The rule indicated malice could be based on an intent to inflict harm [ill will] and was therefore not within the *New York Times* rule. The issue of waiver was not present and in fact could not have been raised. In no part of the opinion did the Court indicate it was broadening, narrowing, enlarging, or deviating from the rule. The rule stands firm as originally stated: actual malice means with knowledge that it was false or with reckless disregard of whether it was false or not.

Simply stated, petitioner now complains that he was hurt *by an instruction he tendered.* By petitioner's Instruction No. 6, respondents had to prove "ill will towards a particular person, an actual intention to injure or defame him." Presumably his counsel at trial determined this was petitioner's best possible theory *for this case.* No instruction, motion or pleading was tendered, filed or even indicated at the trial deviating from this theory. No attempt was made to present not only what is included in the definition of actual malice in *New York Times,* but also what is not included in the definition as in *Garrison.*

But what mystified respondents was the fact that in the Appellate Court petitioner never even asked for a new trial, although his primary complaint was *that the instructions he tendered* were erroneous. He wanted judgment without a trial by jury on his new theory.

Petitioner in his Petition states that *Garrison* effected a post-trial change in the applicable constitutional standard. Respondents cannot accept this proposition as accurate. The *Times* decision is crystal clear in its definition of actual malice. The Court has not deviated an iota in subsequent cases. In any event, even if petitioner's present complaint were real, it was incumbent upon him at least to mention *New York Times* to someone at the trial, which he did not.

The Court below relied on *Pennsylvania R.R.* v. *Illinois Brick Co.,* 297 U.S. 447, 462-63 (1937) which is squarely on all fours with these facts (App. Ct. Op., App. 41-42), *i.e.,* that petitioner's failure to raise the point in the Circuit Court or present it to the Court in accordance with the practice that unquestionably was well established and reasonable, fails to preserve the point for review.

This fundamental rule has been followed consistently in this Court in later cases. *Michel* v. *Louisiana,* 350 U.S. 91, 101 (1955); *Memphis Gas Co.* v. *Beeler,* 315 U.S. 649, 651 (1942). Under the law of Illinois, the point clearly has been waived. *Blanchard* v. *Lewis,* 414 Ill. 515, 520, 521, 112 N.E. 2d 167 (1953); *City of Chicago* v. *Mulligen Enterprises,* 27 Ill. App. 2d 481, 489, 170 N.E. 2d 13 (1960); *Benson* v. *Issaco,* 22 Ill. 2d 606, 177 N.E. 2d 209, 210 (1961); *Libbra* v. *Mt. Olive & Staunton Coal Co.,* 29 Ill. App. 2d 396, 172 N.E. 2d 813 (1961); *Isham* v. *Cudlip,* 33 Ill. App. 2d 254, 179 N.E. 2d 25 (1962); *In re Estate of Leichtenberg,* 7 Ill. 2d 545, 131 N.E. 2d 487 (1956).

B. The Claim That The Complaint Fails to State A Cause of Action.

After two trials and two appeals, petitioner challenges the sufficiency of the complaint. [This Point was not raised in the Appellate Court.]

The Point hardly necessitates answer. It is refuted by the case cited by the petitioner himself. In *Gustafson* v. *Consumers Sales Agency,* 414 Ill. 235, 110 N.E. 2d 865 (1953), the Court held it was *not necessary* to adjudge whether Section 42 (3) of the Illinois Civil Practice Act was intended to permit waiver of all defects in substance even where the complaint failed to state a cause of action because the complaint therein stated an established category of liability. The court held the complaint has to be viewed with all inferences and intendments in its favor after verdict. The court stated that the complaint "clearly informed defendant of the nature of this cause and on the basis on which liability was predicated, and contained, both directly and by implication the essential elements for asserting a right of recovery." The court concluded

the omissions in the complaint in no way prevented a trial of the essential issues in the case, and any objections were deemed waived under the doctrine of "aider by verdict" or under Section 42(3).

Respondents submit that there is nothing omitted in their complaint. Paragraph 5 charges that petitioner, "well-knowing the premises" wrongfully, *maliciously*, wilfully, and *falsely* libeled them. (R. 2). The case was tried by petitioner on the theory of a conditional qualified privileged communication (R. 5-6) presumably because that theory was most suited to the facts in this case in that the respondents would have had to prove ill will and intent to injure the respondents.

Respondents take the position that the *New York Times* decision is not applicable to this case because the patrolmen were not public officials. But even if the complaint were tested under the *Times* decision, it adequately states a cause of action under the authority of *Gustafson* v. *Consumers Sales Agency*, 414 Ill. 235, 110 N.E. 2d 865 (1953). Petitioner was charged with wrongfully, maliciously, wilfully and *falsely* libeling plaintiffs, "well-knowing the premises."

This Point raised now is another in petitioner's late desperate attempts to avoid facing up to the damage his libel has caused.

C. The Claim That Error In The Instructions Was Properly Preserved.

The instruction that petitioner complains of is plaintiffs' instruction 4 indicating that the jury could consider circumstantial evidence in determining actual malice. Petitioner's counsel objected, but did not raise any constitutional grounds. In the post-trial motion again no constitutional grounds were raised, in opposition to this instruction.

It is settled law in Illinois that counsel must not only object to the contested instruction at the conference on instructions, but must point out specifically to the trial court wherein the instruction is faulty and the ground of his objection. *Gilman* v. *Lee,* 23 Ill. App. 2d 61, 68, 161 N.E. 2d 586 (1959); *Onderisin* v. *Elgin, J. & E. Ry. Co.,* 20 Ill. App. 2d 73, 155 N.E. 2d 338 (1959); *Jordan* v. *Jordan,* 35 Ill. App. 2d 265, 182 N.E. 2d 365 (1965); *Irwin* v. *Omar Bakeries, Inc.,* 48 Ill. App. 2d 297, 304, 198 N.E. 2d 700 (1964); *Stephenson* v. *Webb,* 27 Ill. App. 2d 312, 169 N.E. 2d 674 (1960).

It is equally well settled in Illinois that where error is claimed in the giving or refusal of an instruction, the claimed error must be included in the post-trial motion. "The motion should specify the grounds why the refusal (or giving) of the instruction was error, and if the party fails to do so, he waives the right of review." *Sny Island Levee Drainage Dist.* v. *Meyer,* 27 Ill. 2d 530, 190 N.E. 2d 356, 361 (1963); ch. 110, sec. 68.1, Ill. Rev. Stat. Petitioner is restricted "in a court of review, to the grounds or reasons specified in such *written* motion and will be deemed to have waived all other grounds or reasons for a new trial." *Nelson* v. *Union Wire Rope Corp.,* 31 Ill. 2d 69, 199 N.E. 2d 769, 793-94 (1964).

Petitioner cannot now claim error in the instruction. But in any event, he cannot stretch this purported error into a sufficient ground to preserve the constitutional question.

D. The Claim That The Appellate Court Had Discretion To Review The Merits Regardless of Waiver.

Petitioner's next contention to avoid waiver is that the instructions given, including those tendered by him, were so substantially erroneous they deprived him of a fair

trial and therefore can be raised for the first time on appeal.

The cases cited by petitioner simply do not support the proposition. They include five cases involving the misconduct of opposing counsel during the course of the trial. Petitioner also concludes that the "substantially erroneous instructions", specifically his own on the issue of ill-will, permitted affirmance by the Appellate Court on language in the letter "which merely reflected Allyn's mistaken, *but honest,* belief" that plaintiffs had solicited a bribe. The problem with this statement is that the jury, the trial judge, and a unanimous Appellate Court found defendant was neither mistaken nor honest in his letter.

In Illinois in a civil case a party cannot assign as error the trial court's giving of instructions requested by him. This rule is so patent that it scarcely requires citation. *Lundquist* v. *Friedmen's Inc.,* 366 Ill. 332, 8 N.E. 2d 625, 628 (1937); *Ronson* v. *McCurley,* 140 Ill. 626, 632 (1892); see generally 2 Illinois Law & Practice, sec. 674, pp. 602-03.

Petitioner relies on *People* v. *Bender,* 20 Ill. 2d 45, 54, 169 N.E. 2d 328 (1960), but *Bender* is inapplicable for several reasons. First, it was a criminal case (actually a sanity hearing), whereas this is a civil case. Secondly, the State's instructions were clearly erroneous, and under applicable Illinois procedure substantial defects in instructions in *criminal cases* "are not waived by failure to make timely objections thereto if the interests of justice require." Ch. 110, sec. 101.25, Ill. Rev. Stat. The Supreme Court of Illinois therefore had authority to overturn *Bender.* Here there is none.

It is clear therefore that the petitioner cannot shift his position in the Appellate and Supreme Courts to advance a new and different theory for reversal based upon the position that the lower court applied a constitutionally defective definition of "actual malice" or did not give a definition of malice as defined by the United States Supreme Court, since it was the petitioner himself who requested in his peremptory instructions the definition of "actual malice" that was given.

The petitioner cannot complain on appeal of any error committed at his own instance, for he cannot assign as error the procedure that he was a part of producing. If the theory advised by the petitioner was adopted it would not only greatly prejudice the respondents in this case, but would weaken the system of appellate jurisdiction, for it would lead to chaos in the orderly process of a trial. It would be the greatest injustice to hold the trial court accountable for an error assigned in the appeal courts for a position insisted upon by the petitioner himself in the trial court.

E. Conscious Waiver.

In this Point petitioner, in his last gasp, assumes there was a waiver under Illinois law, but says he is not barred because the "procedural forfeiture does not serve any legitimate State interest," citing *Henry* v. *Mississippi*, 379 U.S. 443 (1965). While we can debate for years the meaning of "procedural forfeiture", it is clear that the rule in *Henry* v. *Mississippi* has no application here. This rule was built from the following statement of Mr. Justice Holmes in *Love* v. *Griffith*, 266 U.S. 32, 33-4:

> "When as here *there is a plain assertion of federal rights in the lower court,* local rules as to how far it shall be reviewed on appeal do not necessarily prevail. . . ." (Emphasis supplied.)

In this case, there was no assertion of the federal right during the trial. In *Henry* v. *Mississippi,* the point was preserved by a motion at the close of the State's evidence for a directed verdict because of the erroneous admission of a police officer's testimony. It is manifestly clear that the doctrine of waiver ruled by the Appellate Court in a civil case has been uniformly recognized by this Court. *Pennsylvania R.R.* v. *Illinois Brick Co.,* 297 U.S. 447, 462-63 (1937); *Michel* v. *Louisiana,* 350 U.S. 91, 101 (1955); *Memphis Gas Co.* v. *Beeler,* 315 U.S. 649, 651 (1942).

In this point petitioner also contends that in a civil case, if a litigant is unaware of a constitutional defense at the time of trial and thereby fails to present it, he can present it for the first time on appeal. A waiver must be "conscious".

There is nothing in the Record to indicate defendant's trial counsel was unaware of *New York Times* v. *Sullivan.* With the widespread publicity the case received, presumably most of the people in this country knew about the case, both lay and legal. Petitioner has attached an affidavit to his petition without even requesting leave of this Court. Presumably he feels this is the safer procedure because the Appellate Court denied him leave. The affidavit purports to report the colloquy during the argument on the post-trial motion, long after the trial.

We would and have debated the propriety of filing this affidavit. We debate the contents of the affidavit, specifically the failure of respondents' counsel to object to petitioner's "right" to make the argument based on the *Times* case.

Presumably his trial counsel felt the doctrine was not applicable or that *in this case* he was in a better position to require evidence of ill will or intent to injury.

But even accepting the contents of the affidavit, respondents submit there is no case holding a waiver must be "conscious" in a civil case. In *Curtis Publishing Co.* v. *Butts,* 351 F. 2d 702 (5th Cir. 1965), the trial was completed *before* the decision in *New York Times* v. *Sullivan.* The Court nevertheless held there was a waiver because "for whatever tactical or other reason Curtis sat back and failed to carry the Constitutional torch before verdict and judgment." While in *Butts* it might be said the element of "conscious waiver" is present *before* the Supreme Court acts, consciousness or unconsciousness is not an element where the trial occurs three months *after* the decision as in this case.

It is simply evident that petitioner is grasping for straws at this stage. The raft of criminal cases he cites [which incidentally are not in point either in fact or principle] are an indication of his plight. This is a civil case for money damages between individuals, not the government against the accused. Defendant elected not to or failed to present the issue to the trial court, and cannot now change his theory on appeal.

II.

THE LIBEL WAS NOT CONSTITUTIONALLY PRIVILEGED.

Point I of the Petition contends and argues that the libelous letter was constitutionally privileged. In presenting argument in answer to this contention respondents in no way relax their position on the issue of waiver decided by the Appellate Court, but state in answer that even without waiver, petitioner's argument is without merit.

At the core of petitioner's argument is his insistence that respondents, as patrolmen, were "public officials"

as that term was used in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964). The rationale of the rule in *Times* was stated to be a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. at 270-272.

In subsequent cases, this Court held in *Garrison* v. *Louisiana,* 379 U.S. 64 (1964), that state court judges were public officials, and in *Henry* v. *Collins,* 380 U.S. 356 (1965), that a county attorney and Chief of Police were public officials.

This Court's latest decision is *Rosenblatt* v. *Baer,* 383 U.S. 75 (1966). In *Rosenblatt,* Baer was an area supervisor employed by three elected county commissioners. He had been discharged following a shift of control of the area into a commission. The defendant Rosenblatt wrote material criticizing generally the operation of the ski area, and Baer sued charging the defamation was directed toward him. The Supreme Court reversed a judgment for Baer and remanded the case for new trial. In so doing the court attempted to lay the following ground rules for future actions in light of *New York Times.* With respect to the "public official" issue, the Court held that the trial court in the first instance was to determine whether public officials were involved. The Court stated generally as to public officials:

> "Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, *beyond the general public interest in the qualifications and performance of all govern-*

> *ment employees.*" (Emphasis supplied.) 383 U.S., at 87.

And again, the Court stated:

> "The employee's position must be one which would invite public scrutiny and discussion of the person holding it, *entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.*" (Emphasis supplied.)

The apparent grounds for new trial in *Rosenblatt* were the following: (1) the trial occurred *before* the opinion in *New York Times* and therefore Baer should have the opportunity of presenting evidence to bring himself within the status of "public official"; and (2) the trial court's instructions permitted an award without regard to evidence that the defamation was not directed at Baer but possibly at the three elected officials who employed him.

Other action in the Supreme Court includes the denial of a petition for writ of certiorari in *Pape* v. *Time, Inc.*, 384 U.S. 909, rendering that decision final on the pleadings (discussed further below in this brief). Pending before the Supreme Court is *Curtis Pub. Co.* v. *Butts*, 351 F. 2d 702 (5th Cir. 1965), cert. granted, 385 U.S. 811 (1966).

Respondents have taken the liberty to attempt an analysis of the decisions by subject matter and respectfully submits from this analysis that in no event is there even a debatable question that these patrolmen were public officials.

A. Private Individuals With No Connection With Public Affairs.

(1) Not public officials:

(a) *Clark* v. *Pearson*, 248 F. Supp. 595 (D.C. D.C. 1965) (lawyer in private practice).

(b) *Dun & Bradstreet, Inc.* v. *Nicklaus*, 340 F. 2d 882 (8th Cir. 1965), *cert. den.*, 34 U.S. L.W. 3118 (U.S., Oct. 11, 1965).

(c) *Lorillard* v. *Field Enterprises, Inc.*, 213 N.E. 2d 1 (Ill. App. 1965).

B. Private Individuals With Some Connection With Public Affairs.

(1) Not public officials:

(a) *Meyer* v. *Joint Council 53, Int'l. Brd. of Teamsters*, 416 Pa. 401, 206 A. 2d 382, 388 (1965) (members and officers of opposing labor organizations engaged in a representation election are not public officials).

(b) *Faulk* v. *Aware, Inc.*, 14 N.Y. 2d 954, 202 N.E. 2d 372 (1964) (radio and television performer).

(c) *Spahn* v. *Julian Messner, Inc.*, 250 N.Y.S. 2d 529 (1964) (noted baseball player).

(d) *Dempsey* v. *Time, Inc.*, 252 N.Y.S. 2d 186 (1964) (noted boxer).

(e) *Youssoupouff* v. *Columbia Broadcasting System, Inc.*, 265 N.Y.S. 2d 754 (1965) (Russian prince who participated in the assassination of Rasputin).

(2) Held a public official:

(a) *Walker* v. *Courier-Journal & Louisville Times Co.*, 246 F. Supp. 231 (W.D. Ky. 1965) (former major general held a "public man" because of his "political prominence").

(b) *Gilberg* v. *Goffi*, 251 N.Y.S. 2d 823 (1964) (attorney who was a law partner of the mayor of a municipality).

(c) *Pauling* v. *National Review, Inc.*, 34 U.S.L.W. 2575 (N.Y. Sup. Ct., April 21, 1966) (private citizen who has, by his conduct, made himself a public figure and engaged voluntarily in public discussion of matters of grave public concern).

C. Federal, State And Municipal Elected Or Appointed Officials.

(1) Held public officials:

(a) *Proesel* v. *Myers Pub. Co.*, 48 Ill. App. 2d 402, 199 N.E. 2d 73 (1964) (President of Lincolnwood).

(b) *Mattassa* v. *Bel*, 246 La. 294, 164 So. 2d 332 (member of State house).

(c) *Vigoda* v. *Barton*, 204 N.E. 2d 441 (Mass. 1965) (superintendent and appointing authority of state hospital).

(d) *Clark* v. *Allen*, 415 Pa. 484, 204 A. 2d 42 (1964) (U.S. Senator).

(e) *Sheridan* v. *Crisona*, 14 N.Y. 2d 108, 198 N.E. 2d 359 (1964) (Borough president).

(f) *Schneph* v. *New York Post*, 252 N.Y.S. 2d 934, *aff'd.*, 16 N.Y. 2d 1011, 213 N.E. 2d 309 (1965) (civil attorney appointed by municipality).

(g) *Gersh* v. *Village of Tuckahoe*, 260 N.Y.S. 2d 75 (1965) (member of village planning and public library boards).

(h) *Raffa* v. *Shilbury*, 263 N.Y.S. 2d 866 (1965) (town supervisor).

(i) *Fegley* v. *Morthimer*, 204 Pa. Super. 54, 202 A. 2d 125 (1964) (member of district school board).

D. Candidates For Public Office.

(1) Held public officials:

(a) *Fignole* v. *Curtis Pub. Co.*, 247 F. Supp. 595 (S.D. N.Y. 1965) (candidate for President of Haiti).

(b) *Noonan* v. *Rousselot*, 48 Cal. Rptr., 817 (Cal. App. 1966) (candidate for Congress).

(c) *State* v. *Browne*, 86 N.J. Super. 217, 206 A. 2d 591 (1965) (candidate for mayor).

E. Former Office Holders.

(1) Not public officials:

(a) *Powell* v. *Monitor Pub. Co.*, 34 U.S.L.W. 2538 (N.H., March 1, 1966) (former state governor).

(2) Held public officials:

(a) *McCrossen* v. *U.S.*, 339 F. 2d 810, 813 (10th Cir. 1965) (President Eisenhower).

(b) *Lundstrom* v. *Winnebago Newspapers, Inc.*, 206 N.E. 2d 525 (Ill. App., 2d Dist. 1965) (former Mayor of Rockford by implication).

The foregoing indicates that state and even lower federal courts must decide for themselves what strata of public officials and public affairs are within or without the *New York Times* rule. We submit that this Court intended this to be an *ad hoc* determination by expressly defining its conception of "public official" only in general terms. Some courts have indicated their attitude in passing on the issue, such as *Clark* v. *Pearson*, 248 F. Supp. 595 (D.C.D.C. 1965) (*Times* is limited to "officials in high echelons"; "high-ranking public officials"); *Powell* v. *Monitor Pub. Co.*, 34 U.S.L.W. 2538 (N.H. 1966) (*Rosenblatt* offers no criteria "beyond its application to a 'posi-

tion in government [of] importance' " and possibly where the subject of discussion is "a question of pressing public concern.") This Court's decisions themselves make it clear that the new rule does not apply to lower governmental employees.

Respondents in this cause were regular patrolmen at the time of this occurrence, performing their normal perfunctory duties of traffic control. They were neither elected nor appointed, and had no supervisory power whatever. They were at the lowest rung of the police force and acting under specific orders from their superiors.

The Petition lists three "police" cases. Petitioner could include the *New York Times* case also since it involved an elected Commissioner of Police.

Pape v. *Time, Inc.,* 354 F.2d 558 (7th Cir. 1965), cert. denied 384 U.S. 909 (1966), concerned the appointed Deputy Chief of Detectives of the Chicago Police Department. His permanent rank at the time of the occurrence was lieutenant of police. The court held that in view of his "position", he was "a public official" as that designation was used in *New York Times* v. *Sullivan.* The case therefore is distinguishable in that the "positions" of the policemen in the instant case are ordinary patrolmen. The court further held that the defendant's article "had departed from fidelity" to a Federal Commission's report from which the material for the article had been taken "to make the article more interesting and readable for its audience." Whether Time acted with "reckless disregard" of the truth was therefore a fact question.

Gilligan v. *King,* 264 N.Y.S. 2d 309 (1965), involved a police lieutenant allegedly defamed by certain officials of civil rights organizations. The court held the lieutenant

was a public official and stated further that his title and function were not the "only criteria". The relation of the alleged libel to his official conduct and the public interest or concern in the publication were also considered in *New York Times.* But *Gilligan* has no relationship whatever to the instant facts. The policemen here were patrolmen, not lieutenants, and the issue was traffic control, not civil rights. Also *Gilligan* held that actual malice was a question of fact even under the *New York Times* rule. It "may be inferred from the language and tenor of the libelous statement or the extent or excessiveness of the publication thereof."

Respondents have been unable to read *Arscott* v. *Washington Post* (D.C. D.C. Civ. No. 1026-61, 1964) since it is unreported.

The Appellate Court in three separate places in its decision was careful to conclude that it rendered no opinion on the issue of public official in its holding of waiver. (App. Ct. Op., App. 36, 37, 43).

The foregoing demonstrates, therefore, that there is no authority presently compelling or even indicating the conclusion that respondents were public officials and therefore fair game for defamers. How far would petitioner carry his theory? To the manufacturers of police patrol cars?

Petitioner in his brief has masterfully constructed the duties of policemen controlling traffic into one of the most vital of governmental functions. This conclusion comes somewhat as a surprise to Respondents and one would suppose to their colleagues on the force. They had no idea their daily work qualified equally with such issues as civil rights and Communism. They can only attribute their sudden importance to Petitioner's sudden urge to

bring his defamation within the *New York Times* standard.

Respondents respectfully submit that there is no reason for this Court to review the issues stated by petitioner. The Court has established guide lines which, if raised properly, would give petitioner whatever relief he seeks. The trouble is, the issues were never raised in the trial court.

III.

THE EVIDENCE SHOWS UNEQUIVOCALLY THAT AT THE TIME PETITIONER WROTE THE LETTER HE KNEW THE DEFAMATION WAS FALSE OR ACTED WITH RECKLESS DISREGARD OF TRUTH OR FALSITY.

Again respondents state that in presenting this Point, they in no way relax their position on the propriety of the Appellate Court's ruling on waiver. They simply wish to convey to the court the proposition that the evidence shows actual malice on the part of petitioner under *any* standard, be it constitutional or otherwise.

Since petitioner asked for judgment as a matter of law in the Appellate Court and seeks the same relief here, the familiar rule applicable to the quantum of proof necessary to support the verdict is whether there was, in the record, any evidence, which, standing alone and taken with all its intendments most favorable to respondents, tended to prove the material elements of their case. *Lindroth* v. *Walgreen Co.*, 407 Ill. 121, 94 N.E. 2d 847, 851 (1950); *Garrett* v. *S. N. Nielsen Co.*, 49 Ill. App. 2d 422, 200 N.E. 2d 81, 84 (1964); *Hedge* v. *Midwest Contractors' Equipment Co.*, 53 Ill. App. 2d 365, 202 N.E. 2d 869, 872 (1964).

The Appellate Court specifically found that when petitioners wrote the letter accusing respondents of solicit-

ing the bribe, he *knew* respondents did not solicit the check from his daughter but that it was Paul Power who said he needed $15.00 and his daughter volunteered to give them a check; that petitioner falsely made the inference there had been no traffic violation by placing the word "speeding" in quotes; that he knew the words "cash, what else" were incorrect and used that language to do plaintiffs harm; and that although he had no evidence, he had adjudged plaintiffs guilty, and if they were not disciplined, he was going to divulge his "story" to the newspapers. (App. Ct. Op., App. 45-47).

It is evident therefore that petitioner colored the known facts to fit them within his libel.

The testimony at the trial conclusively proved that the petitioner when he wrote the letter accusing the respondents of a crime, knew the letter was false and he wrote it with the intent to inflict harm on the respondents through such falsehood or he wrote it with reckless disregard as to whether it was false or not.

Th testimony of Sue Owens, one of the occurrence witnesses testifying on behalf of the petitioner clearly stated it was her best recollection that she told Mr. Allyn that it was his daughter who volunteered the check; and furthermore, she absolutely stated that the police (respondents) had never made any attempt to solicit a check from Dorothy Allyn, Mr. Power, or Sue Owens herself. (R. 42). She further stated that she told Mr. Allyn that Paul had told them he needed $25.00 and that it never was the policemen. (R. 44-45, Addl. R. 12). Her testimony showed that the petitioner knew the letter was false when he wrote it, and he wrote it with the intent to inflict harm through such falsehood or he wrote it with reckless disregard as to whether it was false or not. Her testimony on that pertinent point is as follows:

"Mr. Burns: Q. In your conversation with Mr. Allyn, do you remember whether or not you told Mr. Allyn that his daughter had been the one who had volunteered the check.

A. Well, I imagine I told him. I can't recall exactly. I can recall Dorothy doing it, so I imagine that is what I told him.

Q. You best recollection was that you told Mr. Allyn that it was his daughter who was the sole volunteer of writing this check, is that correct.

A. I believe that would be correct." (R. 44).

It has always been the law that the issue of actual malice is one of fact for the jury. See *Hirsch* v. *Feeney*, 83 Ill. 548, 549 (1876) for the leading case in Illinois. See also *Friedes* v. *Sani-Mode Mfg. Co.*, 33 Ill. 2d 291, 211 N.E. 2d 286 (1965); *Ruesch* v. *Anderson*, 75 Ill. App. 526 (1897).

Particularly significant is the case of *Pape* v. *Time, Inc.*, 354 F. 2d 558, 560 (7th Cir. 1965), *cert. den.*, 384 U.S. 909 (1966). The court said:

"We must now determine whether there is sufficient showing in the record before us that Time's statements were knowingly false or made with reckless disregard as to whether or not such statements were false."

"As stated in our previous decision—". . . Time took the risk when it reworded part of the Commission's Report that it might go too far. . . ." We noted that Time had departed from fidelity to the Commission's Report in order to make the article more interesting and readable for its audience. Time's writers who prepared the article must have known the statements as to Pape's conduct were only allegations in a complaint in a civil suit. As we put it (318 Fed. 2d at page 655)—"It is our opinion that a jury could read the Time article as stating that

the Report said Pape and his fellow (sic) officers *did* what the Commission Report merely said the Monroe Complaint *alleged they did.*" (Court's italics.)

"We hold that a sufficient showing has been made so that a jury could find Time, Incorporated acted with reckless disregard as to whether or not the reworded statements hereinbefore described, were true or false. Therefore, it was error for the District Court to grant defendant's motion for a summary judgment."

CONCLUSION

Respondents respectfully submit that the constitutional issues raised by the Petition were never raised in the trial court by the appropriate means available, a ruling made by the trial court on such issues, and, which ruling was preserved in the Record for review. Since such constitutional issues were not raised in the trial court, they cannot be urged for the first time in the Courts of Review, and the failure to raise such defenses in the trial court on such constitutional issues amounts to a waiver by the petitioner of such defenses.

The petitioner tried this case based upon his theory of a defense of a conditional qualified privileged communication, and he cannot now in the Courts of Review shift his theory on appeal to another and different theory. The petitioner freely chose his type of defense, fully tried his case based upon such a defense, and he cannot now plead in the Courts of Review, in order to avoid the fair verdict and judgments entered against him, that he was uninformed of possible constitutional defenses, and thus by using this faulty premise of ignorance be able to claim that he had not waived such constitutional defenses.

This face-saving procedure based upon the alleged claim of ignorance on the part of the attorney who tried the case on behalf of the petitioner, was never made by him in the Record but this claim is made by the attorneys representing the petitioner on appeal and is a completely self-saving hearsay declaration, and is made without the slightest shred of evidence to substantiate it. This alleged claim of ignorance on the part of the defendants trial attorney, and which is untenable on any grounds, is outside of the Record, and consists strictly of a gratuitous self-serving assumption made without any foundation on fact, and made solely and expressly for the purpose of seeking to avoid the legal effects of his failure to plead a defense based upon constitutional grounds. This type procedure has no place in the law, and its use should not be allowed as a device to overturn the verdicts and judgments obtained by the respondents.

The respondents respectfully submit that the decision of the Appellate Court affirming the judgments of the trial court on the verdicts of the jury are proper, and the respondents respectfully pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Attorneys for Respondents.

SUPREME COURT, U. S.
MAY 17 19
JOHN F. DAVIS, C

No. 1216

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

ARTHUR C. ALLYN, JR.

Petitioner,

v.

ROBERT J. FLANNERY AND WILLIAM MOORE

ON PETITION FOR WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I
RESPONDENTS' ASSAULT ON PETITIONER'S GOOD FAITH IS UNJUSTIFIED.

Although the only question before the Court is whether certiorari should be granted, respondents have attacked the merits of petitioner's claim that he wrote the letter under the honest, though mistaken, belief that respondents had taken a bribe. (Resp. Br. 2-4, 11-12, 22-24.)

Whether petitioner wrote the letter with knowledge—or a high degree of awareness—that respondents had not taken a bribe is a question which would become pertinent only if this Court should decide (1) that the accusation was privileged under the *Times* rule and (2) that the privilege

was not waived by the failure of petitioner's counsel to raise the constitutional issue at trial—the substantive and procedural issues that warrant certiorari. Only then would this Court examine the record to see whether it would constitutionally support a finding of knowledge or reckless disregard of falsity—a requirement imposed by *Times* (376 U.S. at 284-285) which apparently leaves respondents "mystified" (Resp. Br. 4, 7).

Nevertheless, we cannot let respondents' misrepresentations of the record pass without comment.

The Appellate Court Made No Findings on Petitioner's Good Faith.

Respondents repeatedly assert that the Appellate Court "found" that petitioner knew that certain factual statements in petitioner's letter were untrue and that petitioner was neither "mistaken" nor "honest" in accusing respondents of soliciting a bribe. (Resp. Br. 2-4, 11-12, 22-23.) *The Appellate Court did no such thing.* Having ruled that the constitutional privilege had been waived, the Appellate Court's function was limited to determining "whether the evidence adduced by the plaintiffs in this case was, as a matter of law, sufficient to support a finding of actual malice [ill will or intent to injure] by the jury." (Pet. App. 43.) The Appellate Court concluded that it was possible for the jury to believe that petitioner had prejudged respondents' guilt and therefore intended to harm them (Pet. App. 45-46); but made no finding as to the sufficiency of such evidence under the new knowledge-or-reckless-disregard-of-falsity standard. Nor would the record have supported a finding of actual malice under the *Times-Garrison* standard.

The Record Shows Petitioner Honestly Believed Respondents Were Guilty.

Petitioner testified that he wrote the letter to Chief Otlewis because it seemed likely that the policemen had taken a bribe and he felt the matter should be reported to the proper authorities for investigation and disciplinary action. (R. 29-31, 33, 47-48.)

To impeach this testimony—and to show petitioner's knowledge or reckless disregard of the falsity of his accusation—respondents curiously rely on certain language used in petitioner's letter which, if anything, emphasizes the sincerity of his belief in respondents' guilt—however mistaken that belief may have been. (Resp. Br. 22-23.)

Whether the check was "solicited" directly from Dorothy or indirectly through Paul Power; whether the car was actually "speeding"; and whether the policemen said to make the check payable to "Cash" or "Cash, what else" are obviously irrelevant in determining whether petitioner believed respondents had taken a bribe. And, as the Appellate Court concluded (Pet. App. 46), petitioner's request for disciplinary action, coupled with his statement that the newspapers had not been advised, indicates that he had determined in his own mind that respondents were guilty. Only if petitioner had *not* believed respondents guilty would knowledge of falsity be established.

Moreover, even if the question of who suggested the check were significant, the record shows that petitioner did not know, when he wrote his letter, that the check had not been solicited by respondents but, instead, had been "volunteered" by Dorothy, in response to Paul Power's statement, after conferring with the policemen, that he needed the $15. Both petitioner and Dorothy testified unequivocally

that Dorothy had not told him she had volunteered the check. (R. 29, 31, 37-38.) And it was only after Sue Owens had testified (both on direct and cross-examination) that she had told petitioner no details beyond the fact that they had been stopped and Dorothy had given the policemen a check (R. 42, 44) that the colloquy relied on by respondents to show that petitioner knew Dorothy had volunteered the check took place (R. 44; Resp. Br. 23-24). Sue's testimony, taken in context, was merely that she did not remember telling petitioner that Dorothy had volunteered the check, but that it was a fact and whatever she had told petitioner would have been the truth. (R. 42-44.) Finally, even if Sue had told petitioner Dorothy had volunteered the check, the subtle significance of that fact wholly escaped petitioner; for he was under the impression that Sue had merely confirmed Dorothy's story. (R. 29, 46.)

In addition to the four phrases in petitioner's letter, respondents also seek evidence of petitioner's knowledge or reckless disregard of falsity in the allegation that, even if petitioner had known that respondents had done a favor for the young people, he would have written the letter and asked for disciplinary action. (Resp. Br. 4.) What the record actually shows is that, on deposition, petitioner said that he could not speculate on the kind of letter, if any, he would have written if he had known the truth. (Certified Record, pp. 306-308.) At trial, petitioner unequivocally testified that he would not have written an accusing letter to Chief Otlewis had he known the truth. (R. 30.) But, regardless of what the record shows, what petitioner would have done *if* he had known the truth is completely irrelevant in determining *whether* he knew the truth when he wrote the letter.

It is apparent that what respondents have done is to seize on the slim evidence used by the Appellate Court to support

the jury's verdict under the old ill-will (intent to injure) standard in an attempt to convince this Court that the case is unworthy of certiorari because the record shows knowledge or reckless disregard of falsity even under the *Times-Garrison* standard. But it is precisely because the old standard permitted liability to be predicated on a finding of intent to injure, even where such intent was based on a misunderstanding of the facts, that the old standard was held to be constitutionally insufficient. As the Appellate Court itself said (Pet. App. 35-36):

> A later United States Supreme Court decision, *Garrison* v. *Louisiana*, 379 U.S. 64, held that neither intent to injure nor lack of due care was sufficient to meet the constitutional test of the *Times* case, and that only an intent to injure *through the calculated use of a falsehood or the reckless disregard of truth* would destroy the constitutional protection. (Emphasis supplied.)

Whatever inferences of intent to injure may have been permissible from the evidence relied on by respondents under the old standard, there is nothing in this record or in the Appellate Court's opinion to indicate that petitioner intended to injure, "*through* the calculated use of a falsehood or the reckless disregard of truth," two policemen whom he did not even know and whom he had no reason to want to harm. (Emphasis supplied.) And there is nothing to shake our statement that petitioner honestly—though mistakenly—believed respondents had solicited a bribe.

II

RESPONDENTS' ATTEMPTS TO DISCREDIT PETITIONER'S WAIVER ARGUMENTS ARE SPECIOUS.

Respondents' reliance (Br. 7-8, 13) on such cases as *Pennsylvania R.R.* v. *Illinois Brick Co.*, 297 U.S. 447

(1937), which merely state the general rule that this Court will not review State court judgments resting on adequate State grounds, is misplaced. As the law stands today, it is clear that whether the defective instructions—including those requested by petitioner's trial counsel—could be attacked for the first time on appeal on constitutional grounds is a Federal question, the answer to which depends, *first*, on whether there was *necessarily* a procedural forfeiture under Illinois law (*Williams* v. *Georgia*, 349 U.S. 375, 383 (1955)) and, *secondly*, whether such a procedural forfeiture of a Federal constitutional right serves a legitimate State interest (*Henry* v. *Mississippi*, 379 U.S. 443, 447-448 (1965)).

Respondents' attempt to distinguish *Henry* on its facts, since the Federal constitutional question there was raised by defendant's motion for directed verdict at the close of the State's evidence, is also fruitless, for the contemporaneous-objection rule invoked by the Mississippi Supreme Court is no different in effect than the waiver rule involved here. The principle that State procedural defects cannot bar review by this Court unless they serve a legitimate State interest is the same in either case.

If, as respondents urge (Br. 5-7), it was really *Times*—and not the later *Garrison* case—that abolished ill will and intent to injure as evidence of actual malice, then respondents went to trial on a defective complaint, for there is no allegation that petitioner knew—or recklessly disregarded—the truth in making his bribery accusation. (The allegation in paragraph 5 of the complaint, when read in context and in conjunction with paragraph 4, that "defendant, well knowing the premises," falsely and maliciously libeled respondents clearly refers not to petitioner's knowledge of what really happened, as respondents would have the Court believe (Br. 7), but to his knowledge of respond-

ents' good names and reputations (R. 2)). As we pointed out in the petition (p. 20), a totally defective complaint can be challenged at any time under Illinois law. This proposition was acknowledged and explained—but found inapplicable—in *Gustafson* v. *Consumers Sales Agency,* 414 Ill. 235 (1953), which respondents have chosen to emphasize while ignoring the other cases cited in support of the rule. (Resp. Br. 8-9.)

On the other hand, if, as seems most likely, it was not until Garrison *that ill will and intent to injure were abolished as constitutional tests of actual malice, there was a post-trial change in the applicable law which can be raised for the first time on appeal under Illinois, as well as Federal, law—a proposition which respondents do not challenge.*

Thus, regardless of whether *Times* or *Garrison* changed the law, there was no waiver under Illinois law.

Even if there was a waiver under Illinois law, it was one which the Appellate Court had discretion to excuse under the Illinois fair-trial rule. It is true that *People* v. *Bender,* 20 Ill. 2d 45 (1960), the case which happens to be most closely analogous to this case on its facts because the injured party was allowed to challenge his own instructions on appeal, was a criminal case and that the fair-trial rule is expressly embodied in the Illinois Supreme Court's rules concerning instructions in criminal cases. However, the Illinois Supreme Court in *Bender* did not rely on the criminal rule and has shown no reluctance to invoke the fair-trial rule in the civil cases cited in our petition (pp. 22-23).

Respondents attempt to distinguish the civil cases on the ground that they involve the misconduct of opposing counsel during the course of trial. (Br. 11.) This was true in four of the five cases cited, but the fifth case, *Muscarello* v. *Peterson,* 20 Ill. 2d 548 (1960), involved a factual misrepre-

sentation by an insurance adjuster long before trial which plaintiff's counsel did not discover until the trial and which he did not raise until argument on the post-trial motion. This illustrates that the application of the fair-trial rule is not confined to any particular kind of error so long as it is so substantial as to work a real injustice.

Even if there was a waiver—and one which the Illinois courts had no discretion to excuse—it is not one which serves a legitimate State interest because it was not a conscious waiver and the error could be corrected at the appellate level by a judgment for petitioner without remand for new trial, without waste of judicial resources.

Respondents' claim (Br. 13) that there is nothing in the record to indicate petitioner's trial counsel was unaware of the *Times* case is true only in the sense that the Appellate Court denied leave to file trial counsel's affidavit. But a copy of the affidavit tendered to the Appellate Court is part of the record (Certified Record 505; Pet. App. 48) and even the Appellate Court accepted the fact that petitioner's trial counsel was not aware of *Times* at the time of trial (Pet. App. 36).

It would be a sorry procedure if a State Appellate Court could bar review by this Court by refusing to allow the filing of an affidavit which shows there was no conscious waiver of a known right. Actually, there is nothing unusual about using affidavits to supply facts concerning a waiver issue which do not otherwise appear of record. See *Williams* v. *Georgia*, 349 U.S. 375, 379-380 (1955); *Henry* v. *Mississippi*, 379 U.S. 443, 450 (1965); *Curtis Publishing Co.* v. *Butts*, 351 F.2d 702, 733 (5th Cir. 1965), certiorari granted, 385 U.S. 811 (1966).

III

RESPONDENTS' POSITION ON THE MEANING OF "PUBLIC OFFICIALS" CONFIRMS THE NEED FOR REVIEW.

Without citation of authority, respondents state (Br. 20):

> This Court's decisions themselves make it clear that the new rule does not apply to lower governmental employees.

It is true that some of the lower courts have taken the restrictive view that the *Times* rule is applicable only to criticism of high-ranking public officials. For example, in *Clark* v. *Pearson,* 248 F. Supp. 188, 193-194 (D.C. D.C. 1965), cited by respondents (Br. 19), the Court said that the *Times* rule was the obverse of the official-privilege rule reflected in *Barr* v. *Matteo,* 360 U.S. 564 (1959). *But this sort of attempt to limit* Times *was expressly rejected* by this Court in *Rosenblatt* v. *Baer,* 383 U.S. 75, 84, n. 10 (1966).

While *Rosenblatt* made it clear that *Times* was not limited in its application to high-ranking public officials, it is nevertheless true, as respondents point out (Br. 21), that there is no present authority *compelling* the treatment of these respondents as public officials who can be criticized in a letter to their commanding officer with impunity, absent knowledge or reckless disregard of falsity. We believe the logic of *Times* indicates that petitioner's criticism was privileged,* but so long as a substantial argument can be made

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* Respondents' attempts to belittle the importance of their function as police officers is reminiscent of a similar argument made by the police lieutenant in *Gilligan* v. *King,* 48 Misc. 2d 212, 215 (N.Y. S.Ct. 1965), but rejected by the court:

> Plaintiff argues, however, that he is not a "public official" within the meaning of the *Times* decision. He is not an elected official, nor even a candidate for election; he is not a governmental executive charged with responsibility in

to the contrary, the question is important enough to be resolved by this Court.

This is surely an unusual case. How often could there occur a combination of circumstances of the kind that led petitioner to believe that the policemen who took Dorothy's check had solicited a bribe? How often would a citizen have the interest and the courage to write the police chief? How often would the accused policemen decide to file a libel suit, even though exonerated? How often would the citizen be willing to carry a matter of principle through two trials, two appeals, a petition for leave to appeal to the Illinois Supreme Court, and a petition to this Court?

But the questions involved in this case are not unusual—the substantive "public official" question affects every citizen and his relationship with those who wield the police power and the procedural waiver question affects all cases tried in the wake of *Times* and before its full impact was articulated in *Garrison*.

Respectfully submitted,

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administering public affairs. He chooses to regard himself, together with thousands of other governmental employees, as "in the lower ranks of government employees." But the title for the office and the function it normally serves are not the only criteria for the determination of the extent of the qualified privilege. The relation of the alleged libel to his "official conduct", and the public interest or concern in the publication, are matters upon which the court placed great emphasis.